No. 15-1358
Vide 15-1359, 15-1363

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| Title: | James W. Ziglar, Petitioner<br>v.<br>Ahmer Iqbal Abbasi, et al. |
| Docketed: | May 9, 2016 |
| Linked with 15A894 | |
| Lower Ct: | United States Court of Appeals for the Second Circuit |
| Case Nos.: | (13-981, 13-999, 13-1002, 13-1003, 13-1662) |
| Decision Date: | June 17, 2015 |
| Rehearing Denied: | December 11, 2015 |

**Questions Presented**

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Feb 26 2016 | Application (15A894) to extend the time to file a petition for a writ of certiorari from March 10, 2016 to April 11, 2016, submitted to Justice Ginsburg. |
| Feb 26 2016 | Application (15A894) granted by Justice Ginsburg extending the time to file until April 11, 2016. |
| Apr 1 2016 | Application (15A894) to extend further the time from April 11, 2016 to May 9, 2016, submitted to Justice Ginsburg. |
| Apr 4 2016 | Application (15A894) granted by Justice Ginsburg extending the time to file until May 9, 2016. |
| May 9 2016 | Petition for a writ of certiorari filed. (Response due June 8, 2016) |
| May 9 2016 | Appendix of James W. Ziglar filed. |
| May 26 2016 | Order extending time to file response to petition to and including August 8, 2016. |
| Jun 8 2016 | Brief amici curiae of Former U.S. Attorneys General William P. Barr, et al. filed. VIDED. |
| Jun 8 2016 | Waiver of right of Federal Respondents to respond filed. |
| Aug 8 2016 | Brief of respondents Ahmer Iqbal Abbasi, et al. in opposition filed. VIDED. |
| Aug 22 2016 | Reply of petitioner James W. Ziglar filed. |
| Sep 21 2016 | DISTRIBUTED for Conference of October 7, 2016. |
| Oct 11 2016 | Petition GRANTED. The petitions for writs of certiorari in Nos. 15-1359 and 15-1363 are granted. The cases are consolidated and a total of one hour is allotted for oral argument. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this petition. |
| Nov 10 2016 | Letter from the Solicitor General regarding case caption. VIDED |
| Nov 18 2016 | Joint appendix filed. VIDED. |
| Nov 18 2016 | Brief of petitioner James W. Ziglar filed. |
| Nov 25 2016 | Brief amici curiae of Former U.S. Attorneys General William P. Barr, et al. filed. VIDED. |
| Dec 1 2016 | Application (16A546) of respondents to file a consolidated brief on the merits in excess of the word limit, submitted to Justice Ginsburg. VIDED. |
| Dec 2 2016 | Application (16A546) granted by Justice Ginsburg to file a consolidated brief of respondents on the merits is excess of the word limit. VIDED. |
| Dec 5 2016 | SET FOR ARGUMENT on Wednesday, January 18, 2017. VIDED |
| Dec 7 2016 | Record requested from the U.S.C.A. 2nd Circuit. |

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| Dec 12 2016 | CIRCULATED. |
| Dec 12 2016 | Motion of petitioners to enlarge the time for oral argument and for divided argument filed. VIDED. |
| Dec 19 2016 | Brief of respondents Ahmer Iqbal Abbasi, et al. filed. VIDED. (Distributed) |
| Dec 20 2016 | Brief amici curiae of Professors of Civil Procedure filed. VIDED. (Distributed) |
| Dec 22 2016 | Brief amicus curiae of Commonwealth Lawyers Association filed. VIDED. (Distributed) |
| Dec 22 2016 | Brief amici curiae of Medical and Other Scientific and Health-Related Professionals filed. VIDED. (Distributed) |
| Dec 23 2016 | Brief amici curiae of Immigration Detention Advocacy Organizations filed. VIDED. (Distributed) |
| Dec 23 2016 | Brief amicus curiae of The American Association for Justice filed. VIDED. (Distributed) |
| Dec 27 2016 | Brief amici curiae of Former Correctional Officials filed. VIDED. (Distributed) |
| Dec 27 2016 | Brief amici curiae of The American Civil Liberties Union, et al. filed. VIDED. (Distributed) |
| Dec 27 2016 | Brief amici curiae of Americans United for Separation of Church and State, et al. filed. VIDED. (Distributed) |
| Dec 27 2016 | Brief amici curiae of Asian Americans Advancing Justice, et al. filed. VIDED. (Distributed) |
| Dec 27 2016 | Brief amici curiae of Karen Korematsu, et al. filed. VIDED. (Distributed) |
| Jan 6 2017 | The motion of petitioners for enlargement of time for oral argument and for divided argument is granted in part and denied in part, and the time is divided as follows: 20 minutes for the Acting Solicitor General on behalf of petitioners in Nos. 15-1358 and 15-1359, 10 minutes for petitioners in No. 15-1363, and 30 minutes for respondents. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this motion. VIDED. |
| Jan 11 2017 | Reply of petitioner James W. Ziglar filed. (Distributed) |
| Jan 18 2017 | Argued. For petitioners in 15-1358 and 15-1359: Ian H. Gershengorn, Acting Solicitor General, Department of Justice, Washington, D. C. For petitioners in 15-1363: Jeffrey A. Lamken, Washington, D. C. For respondents: Rachel Meeropol, New York, N. Y. VIDED. |
| Jun 19 2017 | Adjudged to be REVERSED IN PART and VACATED and REMANDED IN PART. Kennedy, J., delivered the opinion of the Court with respect to Parts I, II, III, IV-A, and V, in which Roberts, C. J., and Thomas and Alito, JJ., joined, and an opinion with respect to Part IV-B, in which Roberts, C. J., and Alito, J., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined. Sotomayor, Kagan, and Gorsuch, JJ., took no part in the consideration or decision of these cases. VIDED. |

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RECORD AND BRIEFS

15-1358
NO.

FILED
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OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Court of Appeals, in finding that Respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown, Named Agents Of The Federal Bureau Of Narcotics*, 403 U.S. 388 (1971), err by defining "context" at too high a level of generality where Respondents challenge the actions taken in the immediate aftermath of the attacks of September 11, 2001, by Petitioner James W. Ziglar, then the Commissioner of the United States Immigration And Naturalization Service, the then-Attorney General of the United States, and the then-Director of the Federal Bureau of Investigation regarding the detention of persons illegally in the United States whom the FBI had arrested in connection with its investigation of the September 11 attacks, thereby implicating concerns regarding national security, immigration, and the separation of powers?

2. Did the Court of Appeals, in denying qualified immunity to Petitioner Ziglar for actions he took in the immediate aftermath of the attacks of September 11, 2001, regarding the detention of persons illegally in the United States whom the FBI had arrested in connection with its investigation of those attacks, err: (A) by failing to focus on the specific context of the case to determine whether the violative nature of Mr. Ziglar's specific conduct was at the time clearly established, instead defining the "established law" at the high level of generality that this Court has warned against; and (2) by finding that even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like Petitioner Ziglar was not

clearly established at the time in question, Respondents nevertheless could maintain a § 1985(3) claim against him so long as his conduct violated some other clearly established law?

3. Did the Court of Appeals err in finding that Respondents' Fourth Amended Complaint met the pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and related cases, because that complaint relied on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with Petitioner Ziglar's liability, but fall short of stating plausible claims?

## PARTIES TO THE PROCEEDINGS BELOW

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the United States District Court for the Eastern District of New York, and appellees-cross-appellants in the United States Court of Appeals for the Second Circuit.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the District Court, but none of them participated in the appeals pertinent to this Petition.

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the District Court, but none of them participated in the appeals pertinent to this Petition.

Petitioner James W. Ziglar, John Ashcroft, and Robert Mueller were defendants in the District Court, and cross-appellees in the Court of Appeals.

Dennis Hasty, Michael Zenk, and James Sherman were defendants in the District Court and appellants in the Court of Appeals.

Salvatore Lopresti was a defendant in the District Court. He filed a notice of appeal from the ruling of the District Court, but when he failed to pay the requisite fee or file a brief in the Court of Appeals, that court dismissed his appeal pursuant to Fed. Rule App. Pro. 31(c).

Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond

Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the District Court, but none of them participated in the appeals pertinent to this Petition.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner James W. Ziglar ("Ziglar") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Turkmen v. Hasty*, 789 F.3d 218 (C.A. 2 2015) (Pooler & Wesley, JJ.) (Raggi, J., concurring in the judgment in part and dissenting in part). Pet. App. 1a-156a. The order of the Court of Appeals denying rehearing and rehearing en banc is reported at *Turkmen v. Hasty*, 808 F.3d 197 (C.A. 2 2015)(Katzmann, C.J., not participating)(Pooler & Wesley, JJ., concurring)(Jacobs, Cabranes, Raggi, Hall, Livingston & Droney, JJ., dissenting). Pet. App. 227a-240a. The opinion of the United States District Court for the Eastern District of New York is reported at *Turkmen v. Ashcroft*, 915 F. Supp.2d 314 (E.D.N.Y. 2013)(Gleeson, J.). Pet. App. 157a-226a.

## JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Second Circuit issued its opinion and judgment June 17, 2015. *Id.* at 1a-2a. On December 11, 2015, the Court of Appeals denied Ziglar's petition for rehearing or rehearing en banc. *Id.* at 227a. On February 26, 2016, Justice Ginsburg in her capacity as Circuit Justice for the Court of Appeals for the Second Circuit extended the time for Ziglar to

file his Petition for a Writ of Certiorari to April 11, 2016. On April 4, 2016, Circuit Justice Ginsburg granted Ziglar's second motion to extend time, to May 9, 2016.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the Appendix. *Id.* at 241a-243a.

## STATEMENT OF THE CASE

The six judges of the Court of Appeals who dissented from the denial of rehearing in this case observed that the panel majority opinion "raise[s] a serious concern" in that it "fail[s] to adhere to controlling Supreme Court precedent," and does so "in three areas of law:" (1) recognition of a *Bivens* remedy; (2) qualified immunity; and (3) pleading standards under *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), and related cases. Pet. App. at 239a. The panel majority's erroneous decision as to each of those areas of law, the rehearing dissenters noted, "raises questions of exceptional importance meriting further review." *Id.* at 232a. The more so given the context in which this case arose.

Petitioner James W. Ziglar held the office of Commissioner of the United States Immigration And Naturalization Service ("INS") when terrorists struck the World Trade Center and other targets September 11, 2001. *Id.* at 3a. He served as INS Commissioner throughout the months immediately following those attacks, the time period relevant to this case and one

of the most extraordinary periods in our nation's history.

At that time, INS was a component of the Department of Justice. *Id.* at 6a-7a. Ziglar thus served under then-Attorney General John Ashcroft and with then-Director of the Federal Bureau of Investigation Robert Mueller in formulating the response to these unprecedented attacks on American citizens on American soil. The perpetrators of these attacks comprised persons who were not U.S. citizens, a number of whom were not legally present in the United States.

Respondents, plaintiffs below, comprise eight persons who, on 9/11, also were not U.S. citizens and also were not legally present in the U.S. During the 9/11 investigation, the United States arrested each of them for immigration violations and detained them for a period of time. *Id.* at 7a-9a. As the case now stands, Respondents have asserted claims on behalf of themselves and a class of similarly-situated persons alleging constitutional torts and seeking money damages under *Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and conspiracy under 42 U.S.C. § 1985(3), naming as defendants Ziglar, Ashcroft and Mueller (the "DOJ Defendants"), as well as several employees of the Bureau of Prisons ("BOP") who worked at the Metropolitan Detention Center ("MDC") in New York City where Respondents were detained (the "MDC Defendants".) *Id.* at 9a-10a.

In reversing the District Court and upholding the sufficiency of these claims against the DOJ and MDC Defendants, the Court of Appeals extended the reach of *Bivens* far beyond any context approved by

this Court, deep into the realm of national security, a context at least four other U.S. Courts of Appeals have found inappropriate for implication of a *Bivens* remedy. The Court of Appeals went astray in this regard by analyzing context at an impermissibly "high level of generality" at which "any claim can be analogized to some other claim for which a *Bivens* action is afforded." *Arar v. Ashcroft*, 585 F.3d 559, 572 (C.A. 2 2009) (*en banc*), *cert. denied*, 560 U.S. 978 (2010). Indeed, the Court of Appeals defind the context of this case—which arose out of actions by the highest-level executives of the Department of Justice to address pressing national security, law enforcement, and immigration concerns during a national emergency unprecedented in our nation's history—as no more than a run-of-the mill inmate case: "federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions." Pet. App. at 24a.

That characterization fails to capture the true context of this case, which asks the federal courts to create an implied constitutional remedy to evaluate and judge national security decisions made at the very highest levels of the national government in matters entrusted peculiarly to the executive branch of government during a in the immediate aftermath of the greatest attack on American lives on American soil by foreign terrorists. Looked at in its proper context, everything about this case presents a powerful case for ***not*** extending *Bivens*. For good reason, this Court (like every other federal Court of Appeals that has considered the question) "has never implied a *Bivens* remedy in a case involving . . .

national security." *Doe v. Rumsfeld*, 683 F.3d 390, 394 (C.A.D.C. 2012). The opinion of the Court of Appeals here flies in the face of this Court's *Bivens* jurisprudence, as well as that of all other federal courts of appeals that have addressed this issues, and should not be permitted to stand.

The Court of Appeals similarly failed in refusing, in the teeth of this Court's numerous precedents, to extend qualified immunity to Ziglar, and in finding that the sparse allegations of Respondents' pleading as to him met the requirements of *Iqbal*.

## I. RESPONDENTS' FOURTH AMENDED COMPLAINT

A group of plaintiffs instituted this case in 2002. Pet. App. at 172a. The case went through various iterations until, in 2009, the Court of Appeals remanded it for the District Court to evaluate plaintiffs' claims under *Iqbal*. *Turkmen v. Ashcroft*, 589 F.3d 542 (C.A.2 2009). On remand, two of the original plaintiffs (the others having settled) joined by six new plaintiffs (together making up the eight Respondents) filed a Fourth Amended Complaint ("FAC"), the pleading at issue in the matter now before this Court. Pet. App. at 5a.[1]

Claims One to Five and Seven of the FAC named the DOJ Defendants and five MDC

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[1] The opinions below set out the lengthy procedural history of this case. Pet. App. at 4a-6a & 172a-175a.

Defendants, while Claim Six named only the MDC Defendants.[2] Insofar as it concerns Ziglar, only three of those claims remain at issue: Claim One, which alleged that the punitive conditions of Respondents' confinement violated their Fifth Amendment substantive due process rights; Claim Two, which alleged that Respondents were held in restrictive confinement because of their race, ethnicity, or national origin, in violation of their Fifth Amendment equal protection rights; and Claim Seven, which alleged a conspiracy among all the defendants to deprive Respondents of their equal protection rights pursuant to 42 U.S.C. § 1985(3). *Id.* at 5a-6a.

Respondents rested each of these claims on the same base: the alleged punitive conditions of confinement that the defendants imposed on Respondents were unlawful because Ziglar and the other defendants lacked "information connecting

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[2] Respondents did not appeal the District Court's dismissal of Claims Four and Five. Pet. App. 20a n.13. Holding that Claim Three, a free-exercise claim, arose in a new *Bivens* context, the Court of Appeals affirmed the District Court's dismissal of that claim as to the DOJ Defendants, and reversed the District Court's refusal to dismiss that claim as to the BOP defendants. *Id.* at 27a. As noted, Claim Six did not name Ziglar as a defendant, but the District Court held that "the factual allegations incorporated by reference into Claim One embrace the strip search allegations" of Claim Six, and therefore "deem[ed] Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants." Pet. App. at 184a n.9.

[Respondents] and class members to terrorism or raising a concern that they might pose a danger to the facility." *Id.* at 272.

Specifically, Respondents alleged that the FBI designated each of them as "of interest" or "of high interest" to its 9/11 investigation. *Id.* at 67a-68a. This classification, Respondents claimed, meant that pursuant to its policy BOP placed them in "the most restrictive and secure conditions permitted." *Id.* at 49a. They alleged that pursuant to the FBI's "hold until cleared" policy, because of this classification none of them could be released, or placed in less-restrictive confinement, unless and until the FBI 9/11 investigation found they had no ties to terrorism. *E.g., id.* at 8a.

The FAC alleged that the DOJ Defendants received "detailed daily reports regarding arrests and detentions, *id.* at 35a-36a, and "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' " to the 9/11 investigation. *Id.* at 36a (quotation marks omitted). It further alleged that Ashcroft ordered that all persons on a list that the FBI's New York City office had compiled be treated as "of interest" and held until cleared, "despite a complete lack of any information or a statement of FBI interest" in these persons. *Id.* at 38a. Without citation to any facts, the FAC then alleged that "Ashcroft, Mueller, and Ziglar's decision to hold" the persons on the FBI list until cleared "was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant

information." *Id.* at 196a n.17 (quotation marks omitted).

Respondents incorporated into the FAC two reports prepared by the DOJ Office of Inspector General stating the results of its investigation into the conditions at MDC and the federal law enforcement response to 9/11 ("OIG Reports"). Respondents attempted to limit this incorporation by stating they were incorporating the OIG Reports "except where contradicted by the allegations" of the FAC, but did not specify what those contradictions might be. *Id.* at 246a n.1 & 247a-248a n.2.[3]

## II. THE DISTRICT COURT'S DECISION

Ziglar, Ashcroft, and Mueller moved to dismiss the FAC for failure to state claims upon which relief can be granted, as did the MDC Defendants. The

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[3] "There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. See U.S. Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003) (the 'OIG Report'), available at http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC See U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the 'Supplemental OIG Report'), available at http://www.justice.gov/oig/special/0312/final.pdf." Pet. App. 6a n.5. Portions of the first OIG Report appear at Pet. App. 342a-477a.

District Court decided all the motions in its January 15, 2013, Memorandum & Order. *Id.* at 157a-226a. In that opinion, the District Court analyzed the motions filed by Ziglar, Ashcroft, and Meuller as a group under the rubric "DOJ defendants" without distinguishing among the three motions, and analyzed the MDC Defendants' motions in the same way (as did the Court of Appeals).

The District Court first rejected Ziglar's argument that recognition of potential *Bivens* liability under Claim One, regarding conditions of confinement, would extend *Bivens* to a new context. *Id.* at 184a-185a n.10. It then held that Claim One did "not plausibly plead that the DOJ defendants possessed punitive intent," an element of the Respondents' substantive due process claim. *Id.* at 189a-191a. "The DOJ defendants," the District Court said, "were entitled to expect that their subordinates would implement their directions lawfully." *Id.* at 190a. Therefore, the District Court held, it could "not reasonably infer that the failure to make that expectation explicit suggests punitive intent." *Ibid.* It therefore dismissed Claim One as to the DOJ Defendants.

As to Claim Two, which alleged that the DOJ defendants "created and implemented the harsh confinement policy because of [Respondents'] race, religion, and national origin," *id.* at 194a, the District Court found that the FAC's averments, viewed together under the *Iqbal* standard, did "not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a. In so ruling, the

District Court noted that "[b]ecause of the broad powers of the political branches in the areas of immigration and naturalization, in that one setting discrimination on grounds of race, religion and national origin is not invidious." *Id.* at 197a-198a. This conclusion made the District Court "reluctant to allow allegations of lawful conduct to support an inference that the DOJ Defendants" acted in violation of the equal protection guarantee of the Fifth Amendment. It said that the FAC's allegation that the DOJ Defendants "created the alleged overtly discriminatory harsh confinement policy" at issue "require[d] inference upon inference," and "each of those inferences [but] very weakly suggested." *Id.* at 198a.

The District Court noted that the allegation that the DOJ Defendants "were aware that Arab and Muslim noncitizens encountered during the [9/11] investigation were, without individualized assessment, treated as 'of interest' potentially raises an inference these defendants harbored discriminatory animus." *Ibid.* But it found "this allegation standing alone would be insufficient to render plaintiffs' equal protection claim plausible" because "the same allegation is also consistent with a policy to treat everyone encountered during the [9/11] investigation as 'of interest.'" *Ibid.*

The District Court observed that in *Iqbal*, this Court had found that the policy of holding high interest detainees until cleared in and of itself did not suggest discriminatory animus, and that, similarly, the fact that this policy disparately affected Muslims and Arabs did not so do, either. The District Court conceded that Respondents had

"amplified their claim" in this regard by alleging that the DOJ Defendants knew that the FBI lacked information tying detainees to terrorism, and by alleging that non-Arab and non-Muslim detainees "were cleared quickly or moved into the general population without clearance." *Id.* at 199a-200a. But viewing the FAC as a whole, the District Court said, it could not find these inferences sufficient to meet *Iqbal's* pleading requirements (though it found "the issue to be a close one." *Id.* at 200.

The District Court accordingly dismissed both Claims One and Two as to the DOJ Defendants, and did so without reaching the issue of qualified immunity. *Id.* at 225a. It also dismissed Claim Three, Respondents' free exercise claim, finding that it "fails to plausibly plead that the DOJ defendants intended to burden [Respondents'] free exercise" rights. *Id.* at 219a. Finally, it dismissed Claim Seven, § 1985(3) conspiracy, because as to the DOJ Defendants, none of the underlying objects of the conspiracy had "survived the motion." *Id.* at 226a.

As for the motion of the MDC Defendants, the District Court dismissed Claims Four and Five (which had not named the DOJ Defendants), but denied their motion with respect to the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two, and Six), their free exercise claim (Claim Three), and the § 1985(3) conspiracy claim. *Id.* at 225a.

In so ruling, the District Court denied the MDC Defendants' claim they were entitled to qualified immunity. *Id.* at 220a, 223a & 225a. The MDC Defendants took an interlocutory appeal from that judgment. At Respondents' request, the District

Court then entered final judgment as to the DOJ Defendants pursuant to FED. RULE CIV. PRO. 54(b), and Respondents cross-appealed the dismissal of the claims against the DOJ Defendants. *Id.* at 19a-20a.

## III. THE COURT OF APPEALS

The Court of Appeals consolidated the various appeals. On June 17, 2013, a divided panel issued its opinion affirming in part and reversing in part (Pooler & Wesley, JJ.), *id.* at 2a-83a, over a lengthy opinion by Judge Raggi concurring in part in the judgment and dissenting in part. *Id.* at 83a-156a.

1. ***Bivens.*** The panel majority first addressed whether Respondents could avail themselves of a *Bivens* remedy in this case. It noted this Court's numerous decisions " 'warn[ing] that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts.' " *Id.* at 22a (quoting *Arar,* 585 F.3d at 571). If the underlying claims do indeed extend *Bivens* to a new context, the panel majority said, the court must consider, first, whether there exists an alternative remedial scheme available to the Respondents, and second, even if there is not, whether "special factors counsel hesitation in creating a *Bivens* remedy." *Ibid.* (quotation marks omitted).

The panel majority observed that it need not consider alternative remedies or special factors if it decided that the "context" for the underlying claims was not "new." *Ibid.* Following *Arar,* the panel majority stated that it would look "to both the rights injured and the mechanism of the injury to determine the context." *Id.* at 23a. The panel majority stated:

> "In our view, setting the context of the *Bivens* claims here as the national response in the wake of 9/11 conflates the two-step process dictated by this Court in *Arar*. The reasons why Plaintiffs were held at the MDC as if they were suspected of terrorism do not present the 'context' of their confinement—just as the reason for Arar's extraordinary rendition did not present the context of his claim. Without doubt, 9/11 presented unrivaled challenges and severe exigencies—but that does not change the 'context' of Plaintiffs' claims." *Ibid.*

The panel majority then found it "plain" that the underlying claims in this case arose "firmly within a familiar *Bivens* context," that being the mundane claim of "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions." *Id.* at 24a. The panel majority accordingly recognized a *Bivens* remedy for Respondents' substantive due process and equal protection conditions-of-confinement claims. *Id.* at 27.[4]

By thus defining the context at a "high level of generality," *Arar*, 585 F.3d at 572, the panel

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[4] The panel majority did not, however, extend *Bivens* to Respondents' free exercise clause claims. It accordingly reversed the District Court's refusal to dismiss this claim as to the MDC Defendants, and affirmed the District Court's dismissal of it as to the DOJ Defendants. Pet. App. 27a.

majority avoided examining whether the Respondents enjoyed alternative remedies, such as those Congress has established under the immigration laws, and even if not, whether special factors—for example, national security, the national emergency surrounding 9/11, the primacy of executive and legislative branches in immigration matters, the failure of Congress to establish a private remedy even though it had known for years of the Respondents' claims—counseled against implying a remedy under the Constitution in this case. Pet. App. at 29a n.17.

2. *Substantive Due Process: Claim One.* The panel majority then turned to Claim One, Respondents' substantive due process challenge to the conditions of their confinement. It noted that Respondents had conceded that none of the DOJ Defendants had created "the particular conditions in question." *Id.* at 30a. It then rejected Respondents' claim that "Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism," *id.* at 30a, because that policy was facially valid and "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner." *Id.* at 30a-31a.

The panel majority then created out of whole cloth a theory to sustain Claim One that Respondents themselves had never advanced in the thirteen years of litigation of this matter, the so-called "list-merger theory." *Id.* at 32a n.21. The panel majority first posited that the FAC plausibly

pleaded that the DOJ Defendants knew that DOJ was detaining illegal aliens in punitive conditions of confinement even though there existed no suggestion that these detainees had any ties to terrorism, "except for the fact they were, or were perceived to be, Arab or Muslim." *Id.* at 31a. While aware of this fact, the panel majority continued, the DOJ Defendants "were responsible for a decision to merge" a list of detainees that the New York office of the FBI had created (called the "New York List") with a national list that INS had created. *Ibid.* The INS national list "contained the names of detainees whose detention was dependent not only on their illegal immigration status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities." *Ibid.* The FBI's New York List, by contrast, contained the names of detainees whom the New York FBI could not determine "had any connection with terrorist activity." *Id.* at 18a. The panel majority concluded the "merger ensured that [Respondents] would continue to be confined in punitive conditions," and this sufficed to state a Fifth Amendment substantive due process claim. *Id.* at 31a-32a.

The panel majority concluded that the FAC plausibly pleaded that it was Ashcroft who had made the decision to merge the lists in early November, 2001, with knowledge that it would result in the confinement of persons the FBI had not linked to terrorism in the harshest possible conditions. *Id.* at 39a. It concluded also that the FAC plausibly pleaded that "Mueller and Ziglar complied with Ashcroft's [merger] order notwithstanding their knowledge that the government had no evidence

linking [Respondents] to terrorist activity." *Id.* at 46a. The panel majority held: "In this instance, [Respondents] plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." *Id.* at 42a. It accordingly permitted Respondents' substantive due process claim, Claim One, to proceed, subject to the limitation that liability could be found only after the decision to merge the lists, which had occurred November 2, 2016. *Id.* at 46a.

3. *Qualified Immunity: Substantive Due Process.* Relying largely on its substantive due process analysis, the panel majority held that Ziglar (like Ashcroft and Mueller) had no entitlement to qualified immunity because the FAC plausibly pleaded that he had personally violated Respondents' well-established rights. *Id.* at 47a. It cited *Bell v. Wolfish*, 441 U.S. 520 (1979), as support for its conclusion that conditions of pretrial detention "not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of the detainees," and no reasonable government official could have thought otherwise. *Id.* at 47a. The panel majority then rejected the contention "that the post-9/11 context warranted qualified immunity even if it were not otherwise available "because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances." *Ibid.*

4. *Equal Protection.* Relying again largely on its substantive due process analysis, the panel majority found that the FAC plausibly pleaded that the DOJ Defendants acted with the requisite discriminatory purpose to state an equal protection claim. It reasoned that the FAC plausibly alleged that the FBI had compiled a list "not based on individualized suspicion, but rather based on race, ethnicity, religion, and/or national origin," and that with knowledge of this, the DOJ Defendants "condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subject to the challenged conditions of confinement." *Id.* at 59a

5. *Qualified Immunity: Equal Protection.* The panel majority denied Ziglar, Ashcroft, and Mueller qualified immunity on the equal protection claim. it first found that they had violated Respondents' rights. It then concluded that it had been "clearly established at the time of [Respondents'] detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." *Id.* at 71a.

6. *Conspiracy.* The panel majority found that the FAC had plausibly pleaded that the DOJ Defendants had engaged in a conspiracy under 42 U.S.C. § 1985(3) to deprive Respondents "of the equal protection of the laws" due to the DOJ Defendants' "racial" or "class-based invidiously discriminatory animus." *Id.* at 77a-78a (citations and quotation

marks omitted). The panel majority also found that the FAC had plausibly pleaded a tacit conspiracy among the DOJ Defendants and defendants Hasty and Sherman "to effectuate the harsh conditions of confinement with discriminatory intent." *Id.* at 78a.[5]

7. *Conspiracy: Qualified Immunity.* Citing *Iqbal v. Hasty*, 490 F.3d 143 (C.A. 2 2007), the panel majority conceded that the applicability of § 1985(3) to federal officials remains an open question, but said that so long as the alleged conspiracy violated some other established law, the defendants were not entitled to qualified immunity. Pet. App. at 81a.

As to Ziglar, Ashcroft, and Mueller, then, the panel majority accordingly reversed the District Court's dismissal of Respondents' two conditions-of-confinement claims (Claim One, substantive due process, and Claim Two, equal protection), as well as the conspiracy claim (Claim Seven). It affirmed the District Court's dismissal of Claim Three, free exercise, as to the DOJ Defendants. *Id.* at 83a.

It also affirmed the District Court's denial of the MDC Defendants' motion to dismiss, except as to Claim Three, free exercise, which it held the District Court should have dismissed, and except to find that

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[5] The panel majority rejected the argument of the MDC Defendants that the intracorporate conspiracy doctrine barred Respondents' § 1985(3) conspiracy claim, Pet. App. at 79a-80a, finding it could not conclude at this stage of the case that the various defendants "acted as members of a single policymaking entity for purposes of [that] claim." *Id.* at 80a.

the FAC stated no claims as to defendant Zenk. (It also affirmed the dismissal of claims brought by plaintiffs who had been held at the federal detention facility in Passaic, New Jersey.) *Ibid.*

8. *Judge Raggi's Opinion.* Judge Raggi filed a lengthy opinion concurring in the judgment in part and dissenting in part. *Id.* at 83a-156a. She began by noting that the Court of Appeals in this case had become "the first to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials" for "policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001." *Id.* at 84a. Her opinion cited four decisions of other courts of appeals that "have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks." *Id.* at 84a n. 1.[6]

As to *Bivens*, Judge Raggi found the majority's narrow focus on the "rights injured" and the "mechanism of injury," to the exclusion of other factors, had led it to define "context" too broadly. *Id.* at 90a. Existing precedent, she reasoned, required an "unqualified" and "careful, holistic examination of all legal and factual components of the 'scenario' in

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[6] Her opinion cited *Vance* v. *Rumsfeld*, 701 F.3d 193 (C.A. 7 2012) (en banc); *Mirmehdi* v. *United States*, 689 F.3d 975 (C.A. 9 2012); *Doe* v. *Rumsfeld*, 683 F.3d 390 (C.A.D.C. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (C.A. 4 2012); *Ali* v. *Rumsfeld*, 649 F.3d 762 (C.A.D.C. 2011); and *Rasul* v. *Myers*, 563 F.3d 527 (C.A.D.C. 2009). Pet. App. at 84a n.1

which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context." *Ibid.*

Accordingly, Judge Raggi would have had the court conduct a more full analysis of all the legal and factual circumstances of Respondents' claims to determine whether those claims truly arose in an established *Bivens* context. She found that "because rights and mechanisms of injury can arise in a variety of circumstances, presenting different legal and factual components, these two factors cannot alone identify context except at an impermissibly high level of generality." *Id.* at 91a. She saw the context of this case as consisting of "lawfully arrested illegal aliens challeng[ing] an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority." *Ibid.* "In the absence of a judgment made in *that* context," she continued, "the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases." *Ibid.* (emphasis in original).

Judge Raggi then proceeded to consider whether special factors counseled hesitation before recognizing a new *Bivens* remedy. She identified four such factors: "(1) plaintiffs challenge an official executive policy (rather than rogue action), implicating (2) the executive's immigration authority, (3) as well as its national security authority, and (4) Congress has afforded no damages remedy to 9/11 detainees despite awareness of the concerns raised here." *Id.* at 97a-98a. These factors,

she concluded, required that the court not extend *Bivens* to the context of this case. *Id.* at 98a-113a.

Judge Raggi also would have extended qualified immunity to all of the defendants, because she could not conclude that any of the defendants here "were plainly incompetent or defiant of established law." *Id.* at 115.

9. *Rehearing.* Ziglar filed a timely petition for rehearing and rehearing en banc. (Ashcroft and Mueller filed a joint petition.) The Court of Appeals denied those petitions on a 6-6 vote (Chief Judge Katzmann not participating). *Id.* at 227a-229a. The panel majority filed a brief concurrence, *id.* at 229a-231a, while the six dissenters filed a longer opinion. The dissent found that the panel majority had failed "to adhere to controlling Supreme Court precedent," *id.* at 239a, "in three areas of law," *id* at 239: the implication of a *Bivens* remedy, *id.* at 232a-236a; qualified immunity, *id.* at 236a-237a; and the sufficiency of the FAC's factual allegations under *Iqbal* to state claims. *Id.* at 238a-239a. It emphasized that these concerns were heightened because they arose "in a case requiring a former Attorney General and FBI Director, among other federal officials, to defend against claims for money damages based on a detention policy applied to illegal aliens in the immediate aftermath of a terrorist attack on this country by aliens." *Id.* at 239a.

## REASONS FOR GRANTING THE WRIT

### I. THE OPINION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S *BIVENS* JURISPRUDENCE AND CONFLICTS WITH THE DECISIONS OF FOUR OTHER COURTS OF APPEALS.

"Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Iqbal*, 556 U.S. at 675 (quotation marks omitted). This Court has warned repeatedly that federal courts must pay "particular heed" not to expand *Bivens* to a new context where "special factors counse[l] hesitation." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)(quotation marks omitted). "But where a proposed *Bivens* claim presents legal and factual circumstances that were not present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in that context.' " Pet. App. at 91a (quoting *Wilkie*, 551 U.S. at 550).

Indeed, for more than 30 years this Court has "refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001), though during that time "it has reversed more than a dozen appellate decisions that created new actions for damages." *Vance v. Rumsfeld*, 701 F.3d at 198. In the 38 years since *Bivens*, this Court has extended it twice only: for claims of employment discrimination in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979); and for Eighth

Amendment violations by prison officials, *Carlson v. Green*, 446 U.S. 14 (1980).

Since *Carlson* in 1980, this Court has declined to extend the *Bivens* remedy to any claim. It has in that time rejected extending *Bivens* to claims of violations of employees' First Amendment rights by their employers, *Bush v. Lucas*, 462 U.S. 367 (1983); for injuries suffered incident to military service, *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); for denials of Social Security benefits, *Schweiker v. Chilicky*, 487 U.S. 412 (1988); against federal agencies, *FDIC v. Meyer*, 510 U.S. 471 (1994); against private corporations operating under federal contracts, *Malesko*, 534 U.S. at 68; and for retaliation by federal officials against private landowners, *Wilkie*, 551 U.S. at 562.

And this Court has "never implied a *Bivens* remedy in a case involving. . . national security." *Doe v. Rumsfeld*, 683 F.3d at 394.

The panel majority, by looking only at "the rights injured and the mechanism of the injury" to determine whether Respondents' *Bivens* claims arose in a "new context," focused too narrowly to meet the requirements of these precedents. As this same Court of Appeals recognized in *Arar*, context must be defined as a "potentially recurring scenario that has similar legal and factual components," 585 F.3d at 572, and that requires an "unqualified" and "careful, holistic examination of all legal and factual components of the 'scenario' in which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context." Pet. App. at 90a. The panel majority put the matter at a

impermissibly "high level of generality" at which "any claim can be analogized to some other claim for which a *Bivens* action is afforded," *Arar*, 585 F.3d at 572, and helps little in determining whether the particular claim at issue arose in a new context. To the contrary, it invites courts to recognize a *Bivens* remedy in "every sphere of legitimate government action." *Wilkie*, 551 U.S. at 561.

The panel majority's cramped focus led it to define the context of this case as a run-of-the mill complaint by an inmate about jail conditions. That falls far short of capturing the context of this case. Respondents were citizens of foreign nations illegally present in the United States at a time when foreign nationals, some also illegally present in the United States, attacked and killed thousands of American citizens by acts of terror. Many of the Respondents had come from the same nations as those who killed thousands of American citizens. The FBI detained them in the immediate aftermath of those terrorist attacks, at a time of heightened national crisis pursuant to executive branch decisions made at the highest levels of the government. That is the context this case presents. It "fundamentally differ[s] from anything recognized in *Bivens* or subsequent cases." *Malesko*, 534 U.S. at 70. As Judge Raggi's dissent demonstrated, "[i]n the absence of a judgment made in *that* context, the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases." Pet. App. at 91a (emphasis in original).

Because the context of this case is indeed new, the panel majority erred by not evaluating those

powerful special factors that here compel the court to deny a *Bivens* remedy: (1) Respondents challenge executive branch policy made at the highest level. Extending *Bivens* to "challenges [to] policies promulgated and pursued by the executive branch, [and] not simply [to] isolated actions of individual federal employees" would be "without precedent and implicate[s] questions of separation of powers as well as sovereign immunity." *Arar*, 585 F.3d at 578. (2) The question whether a *Bivens* remedy is the best way to vindicate the rights of aliens illegally in the country raises issues bound up with the immigration authority of the executive and legislative branches. The Nation's " 'policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government,' " and these " 'matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " *Arar*, 585 F.3d at 570 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589 (1952)). The special circumstances surrounding the immediate aftermath of 9/11 mandate extra caution in this regard. (3) Respondents seek to challenge the executive branch's exercise of its authority in the arena of national security, an arena in which courts have little expertise or experience, and which lies at the core of the executive's authority and competence.

Congress's failure to afford these Respondents a damages remedy also counsels against extending *Bivens*. In the thirteen years since this case was filed, Congress has repeatedly demonstrated its awareness that persons detained in connection with

9/11 have alleged that the government violated their constitutional rights. But Congress has never provided those persons, Respondents included, a damages remedy. Pet. App. at 109a-113a. This congressional inaction cannot be seen as anything other than intentional, and it strongly counsels against recognizing a new cause of action. *Lebron v. Rumsfeld*, 670 F.3d at 551-552. For this reason, as well, the Court of Appeals erred in recognizing a *Bivens* remedy in this case.

By narrowly focusing on "rights injured" and the "mechanism of injury" the Court of Appeals bypassed the special factors enquiry entirely. There can be little doubt that any court examining the special factors present here would conclude that they strongly disfavor an extension of *Bivens* to Respondents' underlying claims. An analysis that permits a court to avoid this enquiry altogether in circumstances where the special factors weigh so strongly against recognizing a *Bivens* remedy is a strong indicator that the court has defined "context" at too abstract a level.

This Court's decisions in *Davis v. Passman* and *Chappell v. Wallace* illustrate how sharply the Court of Appeals' approach in this case conflicts with this Court's *Bivens* jurisprudence. In *Davis*, the Court recognized a *Bivens* cause of action for employment discrimination based on gender brought by a former congressional staff member against her employer, a congressman. *Chappell* also involved claims by public employees alleging employment discrimination, but this time the claims were brought by sailors in the U.S. Navy.

Under the approach of the Court of Appeals in this case, *Chappell* would be found to have arisen in the same context as *Davis*, resulting in recognition of a *Bivens* claim. In those two cases, the right injured, the right to be free from discrimination under the Fifth Amendment, and the mechanism of injury, employment discrimination, were the same.

But to the contrary, this Court declined to recognize a *Bivens* remedy in *Chappell*. It found that because *Chappell* arose in a military context, it was fraught with special factors that did not exist in *Davis*, including the need for military discipline, the special constitutional power of Congress and the President in military matters, the specialized nature of the judgments made about military service members as opposed to civilian employees, and the existence of a separate system of justice in the military created by Congress. 462 U.S. at 298-304. All of these factors led this Court to deny a *Bivens* remedy, despite the similarity with *Davis* on the two factors of "rights injured" and "mechanism of injury."

The panel decision conflicts with the decisions of a number of other Courts of Appeals, as well. In *Mirmehdi*, the Court of Appeals for the Ninth Circuit considered whether to recognize a *Bivens* claim for damages arising from unlawful detention in connection with deportation proceedings. The Ninth Circuit took a broader approach that the Court of Appeals did here, however, concluding that deportation proceedings indeed constituted a context "unique from other situations where an unlawful detention may arise." 689 F.3d at 981. It then found that Congress's failure to provide a damages remedy could not have been inadvertent, given the frequent

and extensive changes it had made to the immigration laws and the availability of habeas corpus. *Id.* at 982.

Turning to "special factors," the Court of Appeals noted that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' " and that these factors " 'counse[l] hesitation' in extending *Bivens*." *Id.* at 982 (quoting *Arar*, 585 F.3d at 574). It noted that these concerns "always mitigate against 'subjecting the prosecutor's motives and decisionmaking to outside inquiry.' " *Id.* at 983 (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999)). The court observed that such cases often result, not in the "mere 'disclosure of normal domestic law-enforcement priorities and techniques,' " but "often involve 'the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products.' " *Ibid.* (quoting *Reno*, 525 U.S. at 490-491. It accordingly held "the unique foreign policy considerations implicated in the immigration context" to be a particularly inappropriate setting to imply a remedy under *Bivens*. *Ibid.*

At least four other federal appellate decisions, cited in n. 6, above, also have refused to create a remedy under *Bivens* based on concerns for national security.

This case cries out with special factors that require that the federal courts refrain from implying a damages remedy. And it presents circumstances of "exceptional importance." This Court should grant certiorari to review and to correct this erroneous extension of *Bivens*.

## II. THE DECISION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S DECISIONS REGARDING QUALIFIED IMMUNITY.

The Court of Appeals rulings as to qualified immunity do not comport with this Court's qualified immunity decisions. *Wilson v. Lane*, 526 U.S. 603 (1999), held that the "right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 615. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The "unlawfulness must be apparent." *Ibid.* For this reason, this Court has "repeatedly told courts . . . not to define clearly established rights at a high level of generality" for purposes of evaluating a claim of qualified immunity." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ibid.*

"Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Ibid.* (quotation marks omitted). And "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Ibid.* (quotation marks omitted).

The Court of Appeals here did not adhere to these admonitions. It defined the "established law" at the high level of generality that this Court has warned against. With regard to Respondents' substantive due process claim, the panel majority said that "*Wolfish* made clear that a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. at 47a. But it did not focus on the particular conduct of Ziglar in the specific circumstances of this case. The Court of Appeals should have asked whether, in the context of the specific circumstances relating to the national emergency of 9/11, a reasonable person in Ziglar's position would clearly have understood that persons illegally in the country, whom the FBI had arrested in connection with its investigation of 9/11, but whom the FBI had not yet linked to any terrorist activity, could not be detained in restrictive conditions until cleared of any possible link to terrorism by the FBI.

That understanding of the law was not clearly established at the time of 9/11. The nation had never faced such a situation in its entire history. The DOJ Defendants were faced with the need to act quickly. They were faced with the imperative not to make a catastrophic mistake that could result in more deaths, for example, by prematurely releasing from restrictive custody a person who— like many of the 9/11 hijackers—was not a citizen and not legally in the country, whom the FBI had arrested in its 9/11 investigation, and whose links to terrorism might be too covert for ready discovery, the DOJ Defendants

reasonably could have taken the view that in the circumstances it was legally appropriate for them to detain such a person in restrictive custody until the FBI could clear him.

In taking such a view, they were neither "plainly incompetent" nor "knowingly violat[ing] the law." And as such, they are entitled to qualified immunity from a suit against them for money damages arising from these actions.

So, too, the Court of Appeals defined the law too abstractly with regard to Respondents' equal protection claim. It said that the DOJ Defendants reasonably understood that "it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. at 71a. Stated as an abstract principle of the law, that statement raises no concerns. But it does not put the focus on the particular conduct of the DOJ Defendants in the circumstances they faced in the immediate aftermath of 9/11. The question rather is whether a reasonable officer in the particular position of the DOJ Defendants would have known that it was plainly illegal to detain Respondents in restrictive confinement until cleared by the FBI. For the reasons stated above, the answer to that question is no.

The Court of Appeals also erred in its analysis of this issue with regard to Respondents' § 1985(3) claims. It recognized that there had been no definitive ruling within the jurisdiction of the Second Circuit as to whether § 1985(3) even applied to federal officials such as the DOJ Defendants. But it held that for purposes of qualified immunity, the

issue was not whether the DOJ Defendants reasonably knew their conduct violated § 1985(3), but whether they more generally " 'could have reasonably believed that it was legally permissible for them to conspire with other federal officials to deprive a person of the equal protection of the laws.' " *Id.* at 81a (quoting *Iqbal v. Hasty*, 490 F.2d at 177).

In *Davis v. Scheuer*, 468 U.S. 183 (1984), this Court held that the defendants had an entitlement to immunity because the claims against them were based on due process and § 1983, which did not clearly prohibit the alleged misconduct, though that conduct clearly violated a regulation. This Court held that "officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation." *Id.* at 194 n.12.

Given the uncertainty whether § 1985(3) applies to the acts of federal officials, it cannot be said that it was clearly established that anything the DOJ Defendants did violated that statute. Therefore, the DOJ Defendants are entitled to qualified immunity for suits brought under § 1985(3). They do not lose that immunity because they allegedly violated some other clearly established law, such as, in this case, the Fifth Amendment's equal protection clause. This Court clearly so held in *Davis*, and the Court of Appeals' decision flatly contradicts that ruling.

## III. The Court Of Appeals Erred In Finding The Vague And Conclusional Allegations Of The Fourth Amended Complaint Sufficient Under *Iqbal* To State A Claim For Relief.

The panel majority sustained Respondents' FAC on a theory of liability that Respondents had never advanced in the thirteen-year history of this litigation, the "list-merger" theory. The panel majority found that Respondents had plausibly pleaded that Ashcroft made the decision to merge that list with the INS national list, thereby ensuring that those detainees on the New York FBI list who were held at the MDC "would continue to be confined in punitive conditions," and that Ziglar and Mueller condoned that act. Pet. App. at 41.

The FAC's allegations in this regard "are plainly not based on [Respondents'] personal knowledge." Pet. App. at 120a. And nothing in the OIG Reports so much as "indicates that [the list-]merger decision was ever ordered or endorsed by [Ashcroft, Mueller, or Ziglar], or even communicated to them." *Id.* at 120a. To the contrary, the OIG Report "states quite clearly that it was Associate Deputy Attorney General Stuart Levey," and not Ashcroft, not Mueller, and most certainly not Ziglar who "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." *Ibid.* (quotation marks omitted). This contradiction on the fundamental point of the merger of the two lists of detainees renders Respondents' claims against the DOJ Defendants implausible. *E.g., Beauvoir v. Israel*, 794 F.3d 244, 248 n.4 (C.A. 2 2015) ("It is well established that

documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading." (Citation and quotation marks omitted)). In such cases, "the document controls and the allegation is not accepted as true." *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (C.A. 2. 2011), *cert. denied*, 133 S.Ct. 1586 (2013)(FED. RULE CIV. PRO. 12(b)(1)).

As the rehearing dissent noted, the "majority's hypotheses as to possible involvement of" the DOJ Defendants "in [the] challenged detentions are actually belied by record facts." Pet. App. at 238a n.14. (1) Respondents pleaded no facts showing that Ziglar intended for them to be held in restrictive custody, *id.* at 125a; (2) Respondents never alleged that Ziglar was "even aware" of the restrictive conditions of confinement, *id.* at 126a (quotation marks omitted); (3) Respondents failed sufficiently to plead that he acted " 'because of,' not merely 'in spite of' the action's adverse effects," *id.* at 130a (quoting *Iqbal*, 556 U.S. at 681); (4) Respondents failed plausibly to allege that their restrictive confinement was arbitrary or purposeless to any legitimate objective such that Ziglar's intent must have been punitive, *id.* at 117a; and (5) "the pleadings provide no factual basis to conclude that anyone made the merger decision *because* it would keep [Respondents] in restrictive confinement." *Id.* at 130a (emphasis in original). *See id.* at 117a-139a.

The FAC "relies only on hypothesized possibilities, or on conclusory assumptions or insinuations of discriminatory purpose that [this] Court has already rejected" in *Ashcroft v. Iqbal*. *Id.* at 238. Its allegations as to Petitioner Ziglar are not

plausible. For this additional reason, this Court should grant the writ of certiorari.

## CONCLUSION

The court should grant James W. Ziglar's Petition For A Writ Of Certiorari To Review The Judgment Of The United States Court of Appeals For The Second Circuit.

Respectfully Submitted,

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RECORD
AND
BRIEFS

No. 15-1358

Supreme Court, U.S.
FILED
MAY - 9 2016
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IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner*,

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA,
AHMER IQBAL ABBASI, ANSER MEHMOOD,
BENAMAR BENATTA, AHMED KHALIFA,
SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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# APPENDIX A
# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NOS. 13-981, 13-999, 13-1002, 13-1003, 13-1662

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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellees-Cross-Appellants,*

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY,

*Defendants-Appellants,*

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,

*Defendants-Cross-Appellees,*

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN; JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

*Defendants.**

---

* The Clerk of the Court is directed to amend the caption as set forth above.

Appeal from the United States District Court
for the Eastern District of New York

OPINION

Argued: May 1, 2014
Decided: June 17, 2015

Before POOLER, RAGGI, and WESLEY, Circuit Judges.

Appeal from a January 15, 2013 Memorandum and Order of the United States District Court for the Eastern District of New York (Gleeson, J.) granting in part and denying in part Defendants' motions to dismiss. Cross-appeal from an April 10, 2013 Judgment of the United States District Court for the Eastern District of New York (Gleeson, J.), which was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on April 11, 2013, granting certain Defendants' motions to dismiss. We AFFIRM in part and REVERSE in part. Judge Raggi concurs in part in the judgment and dissents in part in a separate opinion.

POOLER and WESLEY, Circuit Judges.

On September 11, 2001, "19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda" hijacked four airplanes and killed over 3,000 people on American soil. *Ashcroft* v. *Iqbal* (*Iqbal*), 556 U.S. 662, 682 (2009). This case raises a difficult and delicate

set of legal issues concerning individuals who were caught up in the post-9/11 investigation even though they were unquestionably never involved in terrorist activity. Plaintiffs are eight male, "out-of-status" aliens[1] who were arrested on immigration charges and detained following the 9/11 attacks. Plaintiffs were held at the Metropolitan Detention Center (the "MDC") in Brooklyn, New York, or the Passaic County Jail ("Passaic") in Paterson, New Jersey; their individual detentions generally ranged from approximately three to eight months.

The operative complaint, a putative class action, asserts various claims against former Attorney General John Ashcroft; former Director of the Federal Bureau of Investigation (the "FBI") Robert Mueller; former Commissioner of the Immigration and Naturalization Service (the "INS") James Ziglar; former MDC Warden Dennis Hasty; former MDC Warden Michael Zenk; and former MDC Associate Warden James Sherman.[2] All claims arise out of allegedly discriminatory and punitive treatment Plaintiffs suffered while confined at the MDC or Passaic.

---

[1] We use the term "out-of-status" alien to mean one who has either (1) entered the United States illegally and is deportable if apprehended, or (2) entered the United States legally but who has fallen "out of status" by violating the rules or guidelines for his nonimmigrant status (often by overstaying his visa) in the United States and is deportable.

[2] For ease of reference, we refer to Ashcroft, Mueller, and Ziglar collectively as the "Department of Justice ('DOJ') Defendants," and Hasty, Sherman, and Zenk collectively as the "MDC Defendants." The operative complaint also alleges claims against MDC officials Joseph Cuciti and Salvatore Lopresti. Cuciti did not appeal the district court's decision, and Lopresti filed a notice of appeal but did not timely pay the filing fee or file a brief. Lopresti's appeal was dismissed pursuant to Federal Rule of Appellate Procedure 31(c). Thus, we do not address the claims against Cuciti and Lopresti.

## BACKGROUND

### I. PROCEDURAL HISTORY[3]

Plaintiffs initiated this action over thirteen years ago on April 17, 2002. Over the following two and one-half years, Plaintiffs amended their complaint three times. In June 2006, following a series of motions to dismiss, the district court dismissed Plaintiffs' unlawful-length-of-detention claims but permitted to proceed, *inter alia*, the substantive due process and equal protection claims challenging the conditions of confinement at the MDC. See *Turkmen* v. *Ashcroft* (*Turkmen I*), No. 02 CV 2307(JG), 2006 WL 1662663, at *33-36, 40-41 (E.D.N.Y. June 14, 2006), aff'd in part, vacated in part, *Turkmen* v. *Ashcroft* (*Turkmen II*), 589 F.3d 542 (2d Cir. 2009) (per curiam), remanded to *Turkmen III*, 915 F. Supp. 2d at 314. Plaintiffs and Defendants appealed various aspects of that ruling.

Two significant events occurred while the appeal was pending. First, six of the original eight named Plaintiffs at that time withdrew or settled their claims against the government. See *Turkmen II*, 589 F.3d at 544 n.1, 545. This left only Ibrahim Turkmen and Akhil Sachdeva, both of whom were detained at Passaic, as opposed to the MDC. Second, the Supreme Court issued *Iqbal*, 556 U.S. at 662, which altered the pleading regime governing Plaintiffs' claims. In light of these events and the remaining Plaintiffs' stated desire to replead claims unique to the settling Plaintiffs, this Court affirmed the dismissal of the length of detention claims but vacated and remanded with respect to the conditions of confinement claims. See *Turkmen II*, 589 F.3d at 546-47, 549-50.

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[3] For a more comprehensive review of this case's procedural history, see *Turkmen* v. *Ashcroft* (*Turkmen III*), 915 F. Supp. 2d 314, 331-33 (E.D.N.Y. 2013).

On remand, the district court permitted Plaintiffs to amend their complaint and granted leave for six additional Plaintiffs, all of whom had been held at the MDC, to intervene. The eight current named Plaintiffs are of Middle Eastern, North African, or South Asian origin; six of them are Muslim, one is Hindu, and one is Buddhist. The Fourth Amended Complaint (the "Complaint"), the operative complaint in this case, restates Plaintiffs' putative class claims on behalf of the "9/11 detainees," a class of similarly situated non-citizens who are Arab or Muslim, or were perceived by Defendants as Arab or Muslim, and were arrested and detained in response to the 9/11 attacks.[4]

The Complaint dramatically winnowed the relevant claims and defendants; it alleges seven claims against eight defendants. The first six claims, all brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are: (1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that Defendants subjected Plaintiffs to the challenged conditions because of their, or their perceived, race, religion, ethnicity, and/or national origin; (3) a claim arising under the Free Exercise Clause; (4) and (5) two claims generally alleging interference with counsel; and (6) a claim under the Fourth and Fifth Amendments alleging unreasonable and punitive strip searches. The seventh and final claim alleges a conspiracy under 42 U.S.C. § 1985(3). The DOJ

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[4] Benamar Benatta was originally detained by Canadian authorities on September 5, 2001, after crossing the Canadian border with false documentation. Following the September 11 attacks, Benatta was transported back to the United States and detained in the challenged conditions of confinement and pursuant to the post-9/11 investigation; therefore, we call him a "9/11 detainee."

and MDC Defendants moved to dismiss the Complaint for failure to state a claim, on qualified immunity grounds, and, in some instances, based on a theory that *Bivens* relief did not extend to the claim at issue.

## II. The OIG Reports

Plaintiffs supplemented the factual allegations in their amended complaints with information gleaned from two reports by the Office of the Inspector General of the United States Department of Justice (the "OIG reports")[5] that documented the federal law enforcement response to 9/11 and conditions at the MDC and Passaic.

The OIG reports, which the Complaint "incorporate[s] by reference except where contradicted by the allegations of [the Complaint]," Compl. ¶3 n.1, see also *id.* ¶5 n.2, play a significant role in this case.[6] Primarily, the

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[5] There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. See U.S. Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003) (the "OIG Report"), available at http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC. See U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the "Supplemental OIG Report"), available at http://www.justice.gov/oig/special/0312/final.pdf.

[6] Various Defendants challenge the district court's decision to consider the OIG reports to the extent that they are not contradicted by the Complaint. Defendants are correct that a complaint "include[s] any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991); accord *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). But their objection misses the point. The district court accurately explained that at the pleading stage, although we must consider the words on the

OIG reports provide invaluable context for the unprecedented challenges following 9/11 and the various strategies federal agencies employed to confront these challenges. The reports help orient our analysis of the Complaint.

## III. PLAINTIFFS' ALLEGATIONS[7]

In the aftermath of the 9/11 attacks, the FBI and other agencies within the DOJ immediately initiated an immense investigation aimed at identifying the 9/11 perpetrators and preventing any further attacks. See OIG Report at 1, 11-12. PENTTBOM, the Pentagon/Twin Towers Bombings investigation, was initially run out of the FBI's field offices, but shortly thereafter, Mueller ordered that management of the investigation be switched to the FBI's Strategic Information and Operations Center (the "SIOC") at FBI Headquarters in Washington, D.C. Mueller personally directed PENTTBOM from the SIOC and remained in daily contact with FBI field offices.

In conjunction with PENTTBOM, the Deputy Attorney General's Office (the "DAG's Office") established the

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page (that is, we cannot disregard the fact that the OIG reports make particular findings), we need not consider the truth of those words to the extent disputed by Plaintiffs. See *Turkmen III*, 915 F. Supp. 2d at 342 n.14 (citing *DiFolco*, 622 F.3d at 111). Even were we to view the OIG reports as fully incorporated, reliance on any assertion of fact requires a credibility assessment that we are fundamentally unsuited to undertake at the Rule 12(b)(6) stage. And although the OIG reports cannot determinatively prove or disprove Plaintiffs' allegations, they remain relevant to our analysis because they supplement our understanding of the law enforcement response to 9/11.

[7] The allegations set forth herein are drawn from the Complaint and those portions of the OIG reports incorporated by reference. See *supra* note 6. We presume the veracity of Plaintiffs' well-pleaded allegations. *Iqbal*, 556 U.S. at 679.

SIOC Working Group to coordinate "efforts among the various components within the [DOJ] that had an investigative interest in[,] or responsibility for[,] the September 11 detainees." *Id.* at 15.[8] The SIOC Working Group included representatives from, among other agencies, the FBI, the INS, and the DAG's Office. This group met daily—if not multiple times in a single day—in the months following 9/11; its duties included "coordinat[ing] information and evidence sharing among the FBI, INS, and U.S. Attorneys' offices" and "ensur[ing] that aliens detained as part of the PENTTBOM investigation would not be released until they were cleared by the FBI of involvement with the September 11 attacks or terrorism in general." *Id.*

Given that the 9/11 hijackers were all foreign nationals, the DOJ response carried a major immigration law component. See *id.* at 12. Ashcroft and Mueller developed "a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation ... and discovered to be a non-citizen who had violated the terms of his visa, was arrested." Compl. ¶1; see also *id.* ¶¶39-49. Ashcroft also created the related "hold-until-cleared" policy, which mandated that individuals arrested in the wake of 9/11 not be released from "custody until [FBI Headquarters] affirmatively cleared them of terrorist ties." *Id.* ¶2; see also OIG Report at 38-39.

Within a week of 9/11, the FBI had received approximately 96,000 tips from civilians across the country. These tips varied significantly in quality and reliability.[9]

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[8] The SIOC Working Group acquired this name because its initial meetings occurred at the FBI's SIOC.

[9] For instance, Turkmen came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported "that she rented an

"Mueller [nonetheless] ordered that every one of these tips be investigated, even if they were implausible on their face." Compl. ¶40. Ultimately, 762 detainees were placed on the INS Custody List (the "INS List") that then made them subject to Ashcroft's hold-until-cleared policy.

In the months following 9/11, the DOJ Defendants "received detailed daily reports of the arrests and detentions." *Id.* ¶47. Ashcroft and Mueller also "met regularly with a small group of government officials in Washington, D.C., and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation." *Id.* ¶61.[10] This small group "discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and

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apartment in her home to several Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.'" Compl. ¶251. "The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time." *Id.* Another alien was arrested after the FBI received a tip that stated that the small grocery store where he worked was overstaffed, thus arousing the tipster's suspicions about the "Middle Eastern men" that worked there. OIG Report at 17.

[10] It is unclear whether this "small group" refers to the SIOC Working Group or a distinct group involving Ashcroft, Mueller, and other senior Washington, D.C., officials. One possibility is that Plaintiffs are referring to the small group that consisted of Ashcroft, Mueller, Michael Chertoff, who was then Assistant Attorney General of the Criminal Division, and the Deputy Attorney General. See OIG Report at 13. According to Chertoff, this group discussed the DOJ's post-9/11 law enforcement strategy and policies. Given the makeup of this group and the SIOC Working Group, it is reasonable to infer that information flowed between them; for instance, Chertoff's deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division and personally established the SIOC Working Group.

delay their immigration hearings. The group also decided to spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists[ ] . . . and that they needed to be encouraged in any way possible to cooperate." *Id.*

Plaintiffs, with the exception of Turkmen and Sachdeva, were held at the MDC. Under MDC confinement policy, the 9/11 detainees placed in the MDC were held in the MDC's Administrative Maximum Special Housing Unit (the "ADMAX SHU")—"a particularly restrictive type of SHU not found in most [Bureau of Prisons ('BOP')] facilities because the normal SHU is usually sufficient for correcting inmate misbehavior and addressing security concerns." *Id.* ¶76. The confinement policy was created by the MDC Defendants "in consultation with the FBI." *Id.* ¶65.

Conditions in the ADMAX SHU were severe and began to receive media attention soon after detentions began. See OIG Report at 2, 5. Detainees were: "placed in tiny cells for over 23 hours a day," Compl. ¶5; "strip-searched every time they were removed from or returned to their cell[s], . . . even when they had no conceivable opportunity to obtain contraband," *id.* ¶112; provided with "meager and barely edible" food, *id.* ¶128; denied sleep by "bright lights" that were left on in their cells for 24 hours a day, *id.* ¶119, and, "[o]n some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled" highly degrading and offensive comments, *id.* ¶120; constructively denied recreation and exposed to the elements, see *id.* ¶¶122-23; "denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, [and] eating utensils," *id.* ¶130; and prohibited from moving around the unit, using the telephone freely,

using the commissary, or accessing MDC handbooks, which explained how to file complaints about mistreatment, see *id.* ¶¶ 76, 83, 129, 140.

MDC staff also subjected the 9/11 detainees to frequent physical and verbal abuse. The abuse included slamming the 9/11 detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. See *id.* ¶105; see also Supplemental OIG Report at 8-28. MDC staff also referred to the 9/11 detainees as "'terrorists,' and other offensive names; threaten[ed] them with violence; curs[ed] at them; insult[ed] their religion; and ma[de] humiliating sexual comments during strip-searches." Compl. ¶109. Specifically, Plaintiffs and putative class members at the MDC were referred to by staff as "camel[s]," "fucking Muslims," and "Arabic asshole[s]," *id.* ¶¶ 110, 147, 218.

The MDC Plaintiffs did not receive copies of the Koran for weeks or months after requesting them, and one Plaintiff never received a copy, "pursuant to a written MDC policy . . . that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell[s]." *Id.* ¶132. The MDC Plaintiffs were also "denied the Halal food required by their Muslim faith." *Id.* ¶133. And "MDC staff frequently interrupted Plaintiffs' and class members' prayers," including "by banging on cell doors," yelling derogatory comments, and mocking the detainees while they prayed. *Id.* ¶136.

The named MDC Plaintiffs' individual experiences—several of which are highlighted below—add further tex-

ture to their collective allegations concerning the arrest and confinement of the 9/11 detainees.

**A. Anser Mehmood**

Mehmood, a citizen of Pakistan and devout Muslim, entered the United States on a business visa in 1989 with his wife, Uzma, and their three children. After his visa expired, Mehmood remained in the country and started a trucking business that provided enough earnings to purchase a home in New Jersey and to send funds to his family in Pakistan. In 2000, while living in New Jersey, he and Uzma had their fourth child. In May 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

On the morning of October 3, 2001, Mehmood was asleep with Uzma and their one-year-old son when FBI and INS agents knocked on his door. The agents searched Mehmood's home and asked whether he "was involved with a jihad." *Id.* ¶ 157. Mehmood admitted that he had overstayed his visa. The FBI informed Mehmood that they were not interested in him; they had come to arrest his wife Uzma, whose name the FBI had encountered when investigating Plaintiff Ahmer Abbasi, her brother. Mehmood convinced the FBI to arrest him instead of Uzma because their son was still breastfeeding. "The Agent told Mehmood that they had no choice but to arrest one of the parents, but that Mehmood faced a minor immigration violation only, and he would be out on bail within days." *Id.* ¶159.

Upon his arrival at the MDC, Mehmood "was dragged from the van by several large correctional officers, who threw him into several walls on his way into the facility." *Id.* ¶162. "His left hand was broken during this incident" and "[t]he guards threatened to kill him if he asked any questions." *Id.* His experience in the ADMAX SHU

tracked that of other 9/11 detainees. For instance, "[w]henever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall." *Id.* ¶166. Neither the FBI nor INS interviewed Mehmood following his arrest. Mehmood was not released from the ADMAX SHU until February 6, 2002.

**B. Ahmed Khalifa**

Khalifa, who had completed five years toward a medical degree at the University of Alexandria in Egypt, came to the United States on a student visa in July 2001. He came to the FBI's attention after the FBI received a tip that "several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money." *Id.* ¶195. On September 30, 2001, FBI, INS, and officers from the New York City Police Department came to the apartment Khalifa shared with several Egyptian friends. The officers searched his wallet and apparently became "very interested in a list of phone numbers of friends in Egypt." *Id.* ¶196. After searching the apartment, the agents asked Khalifa for his passport and "if he had anything to do with September 11." *Id.* ¶197. One FBI agent told Khalifa that they were only interested in three of his roommates, but another agent said they also needed Khalifa, whom they arrested for "working without authorization." *Id.*

On October 1, 2001, after briefly stopping at a local INS detention facility to complete paperwork, Khalifa and his roommates were transported to the MDC. When he arrived at the MDC, Khalifa "was slammed into the

wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor." *Id.* ¶201. "[His] wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell." *Id.*

FBI and INS agents interviewed Khalifa on October 7, 2001. One of the agents apologized to Khalifa after noticing the bruises on his wrists. When Khalifa stated that MDC guards were abusing him, the agents "stated it was because he was Muslim." *Id.* ¶202. In notes from the interview, the agents did not question Khalifa's credibility, and noted no suspicion of ties to terrorism or interest in him in connection with PENTTBOM.

Following the interview, MDC guards strip searched Khalifa and "laughed when they made him bend over and spread his buttocks." *Id.* ¶203. Khalifa complains of the conditions associated with detention in the ADMAX SHU, including arbitrary and abusive strip searches, sleep deprivation, constructive denial of recreational activities and hygiene items, and deprivation of food and medical attention.

By November 5, 2001, the New York FBI field office affirmatively cleared Khalifa of any ties to terrorism and sent his name to FBI Headquarters for final clearance. Khalifa was not officially cleared until December 19, 2001. He remained confined in the ADMAX SHU until mid-January 2002.

### C. Purna Raj Bajracharya

Bajracharya is neither Muslim nor Arab. He is a Buddhist and native of Nepal who entered the United States on a three-month business visa in 1996. After overstaying his visa, Bajracharya remained in Queens, New York, for five years, working various odd jobs to send money home to his wife and sons in Nepal. Having

planned to return home in the fall or winter of 2001, Bajracharya used a video camera to capture the streets he had come to know in New York. He came to the FBI's attention on October 25, 2001, when a Queens County District Attorney's Office employee "observed an '[A]rab male' videotaping outside a Queens[ ] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶230. When approached by investigators from the District Attorney's Office, Bajracharya tried to explain that he was a tourist. The investigators took him inside the building and interrogated him for five hours. FBI and INS agents arrived at some point during the interrogation. Bajracharya subsequently took the agents to his apartment; provided them with his identification documents, which established his country of origin; and admitted to overstaying his visa.

Apparently due to the videotaping, Bajracharya was designated as being of "special interest" to the FBI and on October 27, 2001, he was transported to the MDC. *Id.* ¶¶233-34. On October 30, 2001, the FBI agent assigned to Bajracharya's case, along with other law enforcement personnel, interviewed him with the aid of an interpreter. During the interview, "Bajracharya was asked whether he was Muslim or knew any Muslims." *Id.* ¶235. Bajracharya explained that he was not Muslim and knew no Muslims. The FBI agent's notes from the interview do not question Bajracharya's credibility or express any suspicion of ties to terrorism. Two days later, the same agent affirmatively cleared Bajracharya of any link to terrorism. By November 5, 2001, the New York FBI field office completed its investigation and forwarded Bajracharya's case to FBI Headquarters for final clearance. Documents at FBI Headquarters note that

the FBI had no interest in Bajracharya by mid-November 2001. Nonetheless, he was not released from the ADMAX SHU until January 13, 2002. The FBI agent assigned to Bajracharya's case did not understand why Bajracharya remained in the ADMAX SHU throughout this period; the agent eventually called the Legal Aid Society and advised an attorney that Bajracharya needed legal representation.

Bajracharya, who is 5'3" and weighed about 130 pounds at the time of his arrest, complains of the same conditions common to the other MDC Plaintiffs. For instance, he could not sleep due to the light in his cell, and when he was removed from his cell, he would be placed in handcuffs, chains, and shackles and escorted by four or more MDC staff members. Bajracharya became so traumatized by his experience in the ADMAX SHU that he wept constantly. When an attorney requested that the MDC transfer Bajracharya to general population, an MDC "doctor responded that Bajracharya was crying too much, and would cause a riot." *Id.* ¶241.

## IV. The New York List And The "Of Interest" Designation

As originally articulated by Ashcroft, following 9/11, the DOJ sought to prevent future terrorism by arresting and detaining those people who "have been identified as persons who participate in, or lend support to, terrorist activities." OIG Report at 12 (internal quotation marks omitted). To that end, Michael Pearson, who was then INS Executive Associate Commissioner for Field Operations, issued a series of Operational Orders, which addressed the responsibilities of INS agents operating with the FBI to investigate leads on illegal aliens. A September 22, 2001 order instructed agents to "exercise sound judgment" and to limit arrests to those aliens in whom

the FBI had an "interest" and discouraged arrest in cases that were "clearly of no interest in furthering the investigation of the terrorist attacks of September 11th." *Id.* at 45 (internal quotation marks omitted). The "of interest" designation by an FBI agent had significant implications for a detainee. "Of interest" detainees were placed on the INS List, subject to the hold-until-cleared policy, and required FBI clearance of any connection to terrorism before they could be released or removed from the United States. Detainees who were not designated "of interest" to the FBI's PENTTBOM investigation were not placed on the INS List, did not require clearance by the FBI, and could be processed according to normal INS procedures. *Id.* at 40.

The arrest and detention mandate was not uniformly implemented throughout the country. Specifically, the New York FBI investigated all PENTTBOM leads without vetting the initial tip and designated as "of interest" "anyone picked up on a PENTTBOM lead . . . regardless of the strength of the evidence or the origin of the lead." *Id.* at 41; see also Compl. ¶¶43-45. For instance, days after 9/11, New York City police stopped three Middle Eastern men in Manhattan on a traffic violation and found plans to a public school in the car. The next day, their employer confirmed that the men had the plans because they were performing construction work on the school. Nonetheless, the men were arrested and detained. See OIG Report at 42. In another instance, a Middle Eastern man was arrested for illegally crossing into the United States from Canada over a week before 9/11. After the attacks, the man was placed on New York's "'special interest' list even though a document in his file, dated September 26, 2001, stated that FBI New

York had no knowledge of the basis for his detention." *Id.* at 64 (internal quotation marks omitted).

In many cases, the New York FBI did not even attempt to determine whether the alien was linked to terrorism, see *id.* at 14, 16, 41-42, 47, and it "never labeled a detainee 'no interest' until after the clearance process was complete," *id.* at 18 (emphasis added). Thus, aliens encountered and arrested pursuant to a PENTTBOM lead in New York were designated "of interest" (or special interest) and held until the local field office confirmed they had no ties to terrorism. *Id.* at 14; see also *id.* at 53.[11] The result was that the MDC Plaintiffs and others similarly situated in New York were held at the MDC ADMAX SHU as if they met the national "of interest" designation. These practices—specifically the absolute lack of triage—appear to have been unique to New York. See *id.* at 47, 56.[12]

At some point in October 2001, INS representatives to the SIOC Working Group learned that the New York FBI was maintaining a separate list (the "New York List") of detainees who had not been included in the national INS List. One explanation for maintaining a separate New York List was that the New York FBI could not determine if the detainees had any connection with terrorist activity. *Id.* at 54.

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[11] The OIG Report indicates that 491 of the 762 detainees were arrested in New York. OIG Report at 21-22. However, the OIG Report does not identify how many New York arrests were the result of the New York FBI's efforts.

[12] The OIG Report posits that the New York response differed from the rest of the nation, at least in part, as a result of the New York FBI and U.S. Attorney's Office's long tradition of independence from their headquarters in Washington, D.C. See OIG Report at 54.

After INS Headquarters learned of the separate New York List, small groups of senior officials from the DAG's Office, the FBI, and the INS convened on at least two occasions in October and November 2001 to suggest how to deal with the two separate lists of detainees. In discussing how to address the New York List, "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens [on the New York List] had any nexus to terrorism." *Id.* at 53. Nonetheless, this list was merged with the INS List due to the concern that absent further investigation, "the FBI could unwittingly permit a dangerous individual to leave the United States." *Id.* The decision to merge the lists ensured that some of the individuals on the New York List would remain detained in the challenged conditions of confinement as if there were some suspicion that those individuals were tied to terrorism, even though no such suspicion existed.

## V. The Issues On Appeal

In a January 15, 2013 Memorandum and Order, the district court granted in part and denied in part Defendants' motions to dismiss the Complaint. The district court dismissed all claims against the DOJ Defendants. As to the MDC Defendants, the district court denied their motions to dismiss Plaintiffs' substantive due process conditions of confinement claim (Claim 1); equal protection conditions of confinement claim (Claim 2); free exercise claim (Claim 3); unreasonable strip search claim (Claim 6); and conspiracy claim under 42 U.S.C. § 1985(3) (Claim 7). See *Turkmen III*, 915 F. Supp. 2d at 324. The MDC Defendants appealed, and Plaintiffs cross-appealed the dismissal of the claims against the DOJ Defendants

based on a judgment that was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[13]

## DISCUSSION[14]

### I. PLEADING STANDARD

To satisfy *Iqbal*'s plausibility standard, Plaintiffs must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Although plausibility is not a "probability requirement," Plaintiffs must allege facts that permit "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). Factual allegations that are "merely consistent with" unlawful conduct do not create a reasonable inference of liability. *Id.*

Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Well-pleaded factual allegations, in contrast, should be presumed true, and we must determine "whether they plausibly give rise to an entitlement to relief." *Id.* at 679. Ultimately, every plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

With the exception of the Section 1985 conspiracy claim, all of Plaintiffs' claims allege constitutional violations based on injuries first recognized by the Supreme Court in *Bivens*, 403 U.S. at 388. During the course of this litigation, the Supreme Court made it clear in *Iqbal*

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[13] Plaintiffs have not appealed the district court's dismissal of their interference with counsel claims (Claims 4 and 5).

[14] We review the district court's determination of Defendants' Rule 12(b)(6) motions to dismiss de novo. See *Papelino* v. *Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 88 (2d Cir. 2011).

that a federal tortfeasor's *Bivens* liability cannot be premised on vicarious liability. 556 U.S. at 676. Thus, Plaintiffs must plausibly plead that each Defendant, "through the official's own individual actions," violated Plaintiffs' constitutional rights. *Id.* In other words, *Bivens* relief is available only against federal officials who are personally liable for the alleged constitutional tort. *Id.* at 676-77. *Iqbal* precludes relying on a supervisor's mere knowledge of a subordinate's mental state (*i.e.*, discriminatory or punitive intent) to infer that the supervisor shared that intent. *Id.* at 677. Knowing that a subordinate engaged in a rogue discriminatory or punitive act is not enough. But that is not to say that where the supervisor condones or ratifies a subordinate's discriminatory or punitive actions the supervisor is free of *Bivens*'s reach. See *id.* at 683.

## II. Availability Of A *Bivens* Remedy For Plaintiffs' Claims

Unlike the MDC Defendants, none of the DOJ Defendants challenge the existence of a *Bivens* remedy in their briefs to this Court. While the DOJ Defendants did raise this issue below, and are represented by able counsel on appeal, they have chosen to not offer that argument now as a further defense of their victory in the district court. However, as the reader will later discover, our dissenting colleague makes much of this defense, raising it as her main objection to our resolution of the appeal. Given the MDC Defendants' arguments, as well as the dissent's decision to press the issue, legitimately noting that a district court's judgment can be affirmed on any ground supported by the record, Dissenting Op., *post* at 7 n.4 (citing *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014)), we think it appropriate to explain our conclusion that a *Bivens* remedy is

available for the MDC Plaintiffs' punitive conditions of confinement and strip search claims against both the DOJ and the MDC Defendants.

In *Bivens*, 403 U.S. at 388, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Id.* at 70. Because a *Bivens* claim has judicial parentage, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Thus, a *Bivens* remedy is not available for all who allege injury from a federal officer's violation of their constitutional rights.

In *Arar*, we outlined a two-step process for determining whether a *Bivens* remedy is available. First, the court must determine whether the underlying claims extend *Bivens* into a "new context." *Id.* at 572. If, and only if, the answer to this first step is yes, the court must then consider (a) "whether there is an alternative remedial scheme available to the plaintiff," and, even if there is not, (b) "whether special factors counsel hesitation in creating a *Bivens* remedy." *Id.* (internal quotation marks and brackets omitted). As *Arar* noted, case law provides limited guidance regarding how to determine whether a claim presents a new context for *Bivens* purposes. Thus, "[w]e construe[d] the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id.*

Determining the "context" of a claim can be tricky. The MDC Defendants contend that the context of Plain-

tiffs' claims is the nation's "response to an unprecedented terrorist attack." Sherman Br. 45. The DOJ Defendants made a similar argument before the district court in an earlier round of this litigation. See *Turkmen I*, 2006 WL 1662663, at *30. The MDC Defendants, and the dissent on behalf of the DOJ Defendants, contend that *Arar* supports this view. But if that were the case, then why did *Arar* take pains to note that the "context" of Arar's claims was not the nation's continuing response to terrorism, but the acts of federal officials in carrying out Arar's extraordinary rendition? 585 F.3d at 572. We looked to both the rights injured and the mechanism of the injury to determine the context of Arar's claims. In rejecting the availability of a *Bivens* remedy, we focused on the *mechanism* of his injury: extraordinary rendition—"a distinct phenomenon in international law"—and determined this presented a new context for *Bivens*-based claims. *Id.* Only upon concluding that extraordinary rendition presented a new context did we examine the policy concerns and competing remedial measures available to Arar. In our view, setting the context of the *Bivens* claims here as the national response in the wake of 9/11 conflates the two-step process dictated by this Court in *Arar*. The reasons why Plaintiffs were held at the MDC as if they were suspected of terrorism do not present the "context" of their confinement—just as the reason for Arar's extraordinary rendition did not present the context of his claim. Without doubt, 9/11 presented unrivaled challenges and severe exigencies—but that does not change the "context" of Plaintiffs' claims. "[M]ost of the rights that the Plaintiff[s] contend[ ] were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected

to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal* v. *Hasty* (*Hasty*), 490 F.3d 143, 159 (2d Cir. 2007), rev'd on other grounds sub nom. *Iqbal*, 556 U.S. 662.

Thus, we think it plain that the MDC Plaintiffs' conditions of confinement claims are set in the following context: federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions. This context takes account of both the rights injured (here, substantive due process and equal protection rights)[15] and the mechanism of injury (punitive conditions without sufficient cause). The claim—that individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent or without sufficient cause—stands firmly within a familiar *Bivens* context. Both the Supreme Court and this Circuit have recognized a *Bivens* remedy for constitutional challenges to conditions of confinement. In *Carlson* v. *Green*, 446 U.S. 14, 17-20 (1980),

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[15] The rights-injured component of Plaintiffs' claims fall within a recognized *Bivens* context. This Circuit has presumed the availability of a *Bivens* remedy for substantive due process claims in several cases. See *Amir*, 585 F.3d at 598 (Sack, J., dissenting) (citing cases). In addition, the Supreme Court has acknowledged the availability of "a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Iqbal*, 556 U.S. at 675 (citing *Davis* v. *Passman*, 442 U.S. 228 (1979)). And while it is true that the Supreme Court has subsequently declined to extend *Davis* to other employment discrimination claims, such as in *Chappell* v. *Wallace*, 462 U.S. 296, 300-04 (1983), the Court's analysis was focused on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury. Here, where the mechanism of injury is also familiar, a *Bivens* remedy is plainly available.

the Supreme Court recognized an implied remedy for the plaintiff's claim alleging an Eighth Amendment violation for prisoner mistreatment. Furthermore, in *Malesko*, in refusing to extend a *Bivens* remedy to claims against private corporations housing federal detainees, the Supreme Court observed in dicta that, while no claim was available against the *private corporation*, a federal prisoner would have a remedy against *federal officials* for constitutional claims. 534 U.S. at 72. "If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Id.* The Court went on to recognize that the "prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP." *Id.* The MDC Plaintiffs' claims here plainly follow *Malesko*'s guidance: the claims are raised against the individual officers, both at the DOJ and the MDC, who were responsible for subjecting the Plaintiffs to punitive conditions of confinement.

The Second Circuit has also recognized the availability of *Bivens* relief for federal prisoners housed in federal facilities bringing claims against individual federal officers. In *Thomas* v. *Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006), this Court reversed the district court's dismissal of the prisoner plaintiff's *Bivens* claim for violation of his due process rights against supervisory prison officials. See also *Tellier* v. *Fields*, 280 F.3d 69, 80-83 (2d Cir. 2000) (recognizing a *Bivens* remedy for a claim of deprivation of procedural due process brought by a federal prisoner against federal prison officials). Furthermore, in *Hasty*, where we considered claims nearly identical to those at issue in this case, we "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of

the *Bivens* doctrine." *Arar*, 585 F.3d at 597 (Sack, J., dissenting) (discussing *Hasty*, 490 F.3d at 177-78).

Our sister circuits have also permitted *Bivens* claims for unconstitutional conditions of confinement. In *Cale* v. *Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), abrogated on other grounds by *Thaddeus-X* v. *Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc), the Sixth Circuit held that "federal courts have the jurisdictional authority to entertain a *Bivens* action brought by a federal prisoner, alleging violations of his right to substantive due process." The Third Circuit has also permitted a federal inmate to bring a civil rights action against prison officials. See *Bistrian* v. *Levi*, 696 F.3d 352, 372-75 (3d Cir. 2012) (assuming availability of a *Bivens* remedy for plaintiff's Fifth Amendment substantive due process and other constitutional claims challenging his conditions of confinement).

Notwithstanding the persuasive precedent suggesting the availability of a *Bivens* remedy for the MDC Plaintiffs' conditions of confinement claims, the MDC Defendants, and our dissenting colleague, argue that the MDC Plaintiffs' claims present a new *Bivens* context because the Plaintiffs are illegal aliens. But because the MDC Plaintiffs' right to be free from punitive conditions of confinement is coextensive with that of a citizen, their unlawful presence in the United States at the time of the challenged confinement does not place their standard mistreatment claim into a new context. Indeed, the Fifth Circuit has recognized a *Bivens* claim raised by a Mexican national for violations of her Fourth and Fifth Amendment rights to be free from false imprisonment and the use of excessive force by law enforcement personnel. See *Martinez-Aguero* v. *Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006). The Ninth Circuit has also recog-

nized a *Bivens* claim for due process violations that occurred during an illegal alien plaintiff's detention. See *Papa* v. *United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002).[16] Thus, we conclude that a *Bivens* remedy is available for the Plaintiffs' substantive due process and equal protection conditions of confinement claims.

Our understanding of *Bivens* and this Court's decision in *Arar* do not however suggest the availability of a *Bivens* remedy for the Plaintiffs' free exercise claim. That claim—that Defendants deliberately interfered with Plaintiffs' religious practices by: (1) denying them timely access to copies of the Koran; (2) denying them Halal food; and (3) failing to stop MDC staff from interfering with Plaintiffs' prayers—does not fall within a familiar *Bivens* context. Here, it is the right injured—Plaintiffs' free exercise right—and not the mechanism of injury that places Plaintiffs' claims in a new *Bivens* context. Indeed, the Supreme Court has "not found an implied damages remedy under the Free Exercise Clause" and has "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 556 U.S. at 675 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)). Accordingly, we agree with the MDC Defendants that Plaintiffs' free exercise claim should have been dismissed.

But the MDC Plaintiffs' claim that they were subjected to unlawful strip searches falls within an established *Bivens* context: federal detainee plaintiffs, housed in a

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[16] We note that the Ninth Circuit has declined to provide illegal aliens with an implied *Bivens* remedy for *unlawful detention* during deportation proceedings. *Mirmehdi* v. *United States*, 689 F.3d 975, 981-83 (9th Cir. 2012). Of course, that decision is plainly inapposite here where the MDC Plaintiffs do not challenge the fact that they were detained, but rather the conditions in which they were detained.

federal facility, allege that individual federal officers subjected them to unreasonable searches in violation of the Fourth Amendment. The MDC Defendants fail to persuasively explain why recognizing the MDC Plaintiffs' unlawful strip search claim would extend *Bivens* to a new context. Indeed, the right violated certainly falls within a recognized *Bivens* context: the Fourth Amendment is at the core of the *Bivens* jurisprudence, as *Bivens* itself concerned a Fourth Amendment claim. In *Bivens*, the plaintiff brought a Fourth Amendment claim for the defendants' use of unreasonable force without probable cause, resulting in the plaintiff's unlawful arrest. 403 U.S. at 389-90; see also *Groh* v. *Ramirez*, 540 U.S. 551, 555 (2004) (recognizing the availability of a *Bivens* remedy for a Fourth Amendment claim of an unreasonable search, as a result of a facially invalid warrant). This Circuit has also permitted *Bivens* relief for Fourth Amendment claims involving unreasonable searches. See, *e.g.*, *Castro* v. *United States*, 34 F.3d 106, 107 (2d Cir. 1994). And the mechanism of the violation—here, an unreasonable search performed by a prison official—has also been recognized by this Circuit. Indeed, in *Arar*, we stated that "[i]n the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued .... [T]he immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes." 585 F.3d at 580; see also *Hasty*, 490 F.3d at 170-73 (assuming the existence of a *Bivens* remedy to challenge strip searches under the Fourth Amendment).

Accordingly, we conclude that a *Bivens* remedy is available for Plaintiffs' conditions of confinement claims,

under both the Due Process and Equal Protection Clauses of the Fifth Amendment, and Fourth Amendment unreasonable and punitive strip searches claim.[17] However, Plaintiffs' free exercise claim would require extending *Bivens* to a new context, a move we decline to make absent guidance from the Supreme Court.

## III. Claim 1: Substantive Due Process Conditions Of Confinement

The MDC Plaintiffs allege that the harsh conditions of confinement in the MDC violated their Fifth Amendment substantive due process rights and that all Defendants are liable for this harm.[18] Plaintiffs present distinct theories of liability as to the DOJ and MDC Defendants.

### A. Applicable Legal Standard

The Fifth Amendment's Due Process Clause forbids subjecting pretrial detainees to punitive restrictions or conditions. See *Bell* v. *Wolfish* (*Wolfish*), 441 U.S. 520, 535 & n.16 (1979).[19] Plaintiffs must plausibly plead that Defendants, (1) with punitive intent, (2) personally engaged in conduct that caused the challenged conditions of

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[17] Because we conclude that Plaintiffs' substantive due process, equal protection, and unreasonable punitive strip searches claims do not extend *Bivens* to a new context, we need not address "whether there is an alternative remedial scheme available to the plaintiff" or "whether special factors counsel hesitation in creating a *Bivens* remedy." *Arar*, 585 F.3d at 572 (internal quotation marks and brackets omitted).

[18] Turkmen and Sachdeva, the Passaic Plaintiffs, do not bring a substantive due process conditions of confinement claim or unreasonable strip search claim (Claims 1 and 6).

[19] The parties have not argued for a different standard in this appeal. Accordingly, we do not address whether the rights of civil immigration detainees should be governed by a standard that is even more protective than the standard that applies to pretrial criminal detainees.

confinement. See *id.* at 538; see also *Iqbal*, 556 U.S. at 676-77. Absent "an expressed intent to punish," *Wolfish*, 441 U.S. at 538, we may only infer that Defendants acted with punitive intent if the challenged conditions were "not reasonably related to a legitimate goal—if [they were] arbitrary or purposeless," *id.* at 539.

**B. The DOJ Defendants**

While the DOJ Defendants do not raise a no-*Bivens*-claim defense, they do forcefully contest liability here with powerful post-*Iqbal* assertions that "the former Attorney General and FBI Director did not themselves require or specify any of the particular conditions set forth in the complaint. And they cannot be held liable on what amounts to a theory of *respondeat superior* for the actions of others who may have imposed those conditions." Ashcroft & Mueller Br. 10. They contend that because the former Attorney General's initial detention order was constitutional, having been approved by the Supreme Court in *Iqbal*, the DOJ Defendants were "entitled to presume that the facially constitutional policy would in turn be implemented lawfully . . . ." *Id.* at 9. We agree . . . to a point.

The MDC Plaintiffs concede that the DOJ Defendants did not create the particular conditions in question. See *Turkmen III*, 915 F. Supp. 2d at 326 n.4; see also OIG Report at 19, 112-13 (reporting that, at least initially, BOP officials determined the conditions under which detainees would be held, without direction from the FBI or elsewhere). The MDC Plaintiffs similarly fail to plead that Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism. Given the mandate's facial validity, the DOJ Defendants had a right

to presume that subordinates would carry it out in a constitutional manner. See *Al-Jundi* v. *Estate of Rockefeller*, 885 F.2d 1060, 1065-66 (2d Cir. 1989). But that is not the end of the matter.

The MDC Plaintiffs plausibly plead that the DOJ Defendants were aware that illegal aliens were being detained in punitive conditions of confinement in New York and further knew that there was no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be, Arab or Muslim.[20] The MDC Plaintiffs further allege that while knowing these facts, the DOJ Defendants were responsible for a decision to merge the New York List with the national INS List, which contained the names of detainees whose detention was dependent not only on their illegal immigrant status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities. The merger ensured that the MDC

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[20] The dissent counters that "[t]his is not apparent in the record," citing Plaintiff Bajracharya's videotaping of a building in Queens as evidence of that Plaintiff's possible tie to terrorism. Dissenting Op., *post* at 43 n.28. The dissent makes no mention, of course, of Plaintiff Khalifa, who was told that the FBI was only interested in his roommates, but who was arrested and then detained in the ADMAX SHU anyway, Compl. ¶197; or of Plaintiff Mehmood, who was arrested and detained in the ADMAX SHU in place of his wife, in whom the FBI had apparently expressed interest, but who was still breastfeeding their son, *id.* ¶159. The dissent further claims that detainees were not sent to the ADMAX SHU based on their perceived race or religion, but—as the OIG Report states—based on whether they were designated of "high interest" to the PENTTBOM investigation. Dissenting Op., *post* at 44 n.28 (citing OIG Report at 18, 111). But, as the dissent concedes, *id.*, Plaintiffs' well-pleaded Complaint specifically contradicts this point: the MDC Plaintiffs were detained in the ADMAX SHU "even though they had not been classified 'high interest,'" Compl. ¶4.

Plaintiffs would continue to be confined in punitive conditions. This is sufficient to plead a Fifth Amendment substantive due process violation.[21] Given the lack of individualized suspicion, the decision to merge the lists was not "reasonably related to a legitimate goal." See *Wolfish*, 441 U.S. at 539. The only reason why the MDC Plaintiffs were held as if they were suspected of terrorism was because they were, or appeared to be, Arab or Muslim. We conclude that this plausibly pleads punitive intent. *Id.*

1. *Punitive Conditions of Confinement*

Contrary to the district court's conclusion that Plaintiffs failed to "allege that the DOJ [D]efendants were even aware of [the] conditions," *Turkmen III*, 915 F. Supp. 2d at 340, the Complaint and the OIG Report each contain allegations of the DOJ Defendants' knowledge of the challenged conditions. Plaintiffs allege, *inter alia*, that Mueller ran the 9/11 investigation out of FBI Headquarters; and that "Ashcroft, Mueller[,] and Ziglar received detailed daily reports of the arrests and detentions," Compl. ¶ 47; see also *id.* ¶¶ 63-65.

The OIG Report makes plain the plausibility of Plaintiffs' allegations. The "[DOJ] was aware of the BOP's decision to house the September 11 detainees in

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[21] We acknowledge, as the dissent points out, that the MDC Plaintiffs did not advance the "lists-merger theory" before this Court or the district court. Dissenting Op., *post* at 43 n.28. Rather, they structured the Complaint to challenge Ashcroft's arrest and detention mandate as initially formulated and generally applied. In examining the Complaint's sufficiency, we have been clear that the pleadings are inadequate to challenge the validity of the policy *ab initio*, but do state a claim with regard to the merger decision, an event that Plaintiffs explicitly reference in the Complaint. See Compl. ¶ 47; Pls.' Br. 38. Sufficiency analysis requires a careful parsing of the Complaint and that is all that has occurred here.

high-security sections in various BOP facilities." OIG Report at 19. The Deputy Chief of Staff to Ashcroft told the OIG that an allegation of mistreatment was called to the Attorney General's attention. *Id.* at 20. And BOP Director Kathy Hawk Sawyer stated that in the weeks following 9/11, the Deputy Attorney General's Chief of Staff and the Principal Associate Deputy Attorney General "called her . . . with concerns about detainees' ability to communicate both with those outside the facility and with other inmates," *id.* at 112, which she said confirmed for her that the decision to house detainees in the restrictive conditions of the ADMAX SHU was appropriate, *id.* at 112-113. This supports the reasonable inference that not only was Ashcroft's office aware of some of the conditions imposed, but affirmatively supported them. See also *id.* at 113 (DOJ officials told Sawyer to "take [BOP] policies to their legal limit").[22] Furthermore, the OIG Report also makes clear that conditions in the ADMAX SHU began to receive media attention soon after detentions began, see *id.* at 2, 5;[23] thus, it seems implausible

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[22] The dissent attempts to minimize the force of these comments, claiming that communications about a condition of confinement that was lifted before the merger decision cannot support an inference as to what the DOJ Defendants knew about the conditions in the ADMAX SHU. Dissenting Op., *post* at 56-57. Simply put, we disagree. The fact remains that a condition of confinement, less severe and abusive than the conditions at issue here, garnered the attention of senior officials; it stands to reason that conditions that kept detainees in their cells for twenty-three hours a day, denied them sleep by bright lights, and involved excessive strip searches and physical abuse, would have come to the DOJ Defendants' attention.

[23] See, *e.g.*, Neil A. Lewis, *A Nation Challenged: The Detainees; Detentions After Attacks Pass 1,000, U.S. Says*, N.Y. TIMES, Oct. 30, 2001, available at http://www.nytimes.com/2001/10/30/us/a-nation-challenged-the-detainees-detentionsafter-attacks-pass-1000-us-says

that the public's concerns did not reach the DOJ Defendants' desks.

Of course, we cannot say for certain that daily reports given to Ashcroft and Mueller detailed the conditions at the ADMAX SHU or that the daily meetings of the SIOC Working Group (containing representatives from each of the DOJ Defendants' offices) discussed those conditions. But on review of a motion to dismiss, Plaintiffs need not *prove* their allegations; they must *plausibly plead* them. At a minimum, a steady stream of information regarding the challenged conditions flowed between the BOP and senior DOJ officials. Given the MDC Plaintiffs' allegations, the media coverage of conditions at the MDC, and the DOJ Defendants' announced central roles in PENTTBOM, it seems to us plausible that information concerning conditions at the MDC, which held eighty-four of the 9/11 detainees, reached the DOJ Defendants.[24]

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[24] Furthermore, the OIG reports were issued pursuant to the Office of the Inspector General's responsibilities under the USA PATRIOT Act, which was enacted on October 26, 2001. See OIG Report at 3 n.6. The PATRIOT Act, Section 1001, reads: "The Inspector General of the Department of Justice shall designate one official who shall—(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001). "On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter." OIG Report at 144. It seems to us most plausible that if the OIG—who is "under the authority, direction, and control of the Attorney General with respect to audits or investigations," 5 U.S.C. App. 3 §8E(a)(1)—was aware of the challenged conditions at the MDC, the DOJ Defendants were as well.

2. *Lack of Individualized Suspicion*

The MDC Plaintiffs also plausibly plead that the DOJ Defendants were aware that the FBI had not developed any connection between some of the detainees and terrorist activities. The Complaint and OIG Report both make clear that the New York FBI arrested all "out-of-status" aliens encountered—even coincidentally—in the course of investigating a PENTTBOM lead. OIG Report at 41-42, 69-70. These arrestees were "deemed 'of interest' for purposes of the 'hold until cleared' policy, regardless of the strength of the evidence or the origin of the lead." *Id.* at 41. Those deemed of "high interest" were sent to the MDC's ADMAX SHU, *id.* at 111, but "there was little consistency or precision to the process that resulted in detainees being labeled 'high interest,'" *id.* at 158.[25]

Even if the DOJ Defendants were not initially aware of this practice, the Complaint and OIG reports support the reasonable inference that Ashcroft and Mueller learned of it within weeks of 9/11. The Complaint clearly alleges that the DOJ Defendants agreed that individuals for whom the FBI could only articulate an immigration law violation as a reason for detention—and for whom the FBI had not developed any reliable tie to terrorism—would continue to be treated as if the FBI had reason to believe the detainees had ties to terrorist activity. Compl. ¶67. Plaintiffs point to the detailed daily reports

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[25] Even some detainees who were not labeled "high interest" were nonetheless sent to the MDC's ADMAX SHU. For example, "Abbasi, Bajracharya, Mehmood, and Khalifa[ ] were placed in the ADMAX SHU even though they had not been classified 'high interest' and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment." Compl. ¶4.

that the DOJ Defendants received regarding arrests and detentions and allege that the DOJ Defendants "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' to the PENTTBOM investigation." *Id.* ¶47. Indeed, they claim that Ashcroft, in particular, "insisted on regular, detailed reporting on arrests"; they allege that he received a daily "Attorney General's Report" on persons arrested. *Id.* ¶63. They further allege that it was Ziglar who was ultimately responsible for providing much of this information—which he gleaned from his twice daily briefings with his staff regarding the 9/11 detentions—to Ashcroft, indicating that he too was aware of the lack of individualized suspicion. *Id.* ¶64.

Once again, the OIG reports also support the MDC Plaintiffs' allegation that the DOJ Defendants became aware of the lack of individualized suspicion for some detainees held in the challenged conditions of confinement. The OIG Report states that "[a] variety of INS, FBI, and [DOJ] officials who worked on the[] September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism." OIG Report at 45. Other DOJ officials also stated that it "soon became clear" that only some of the detainees were of "genuine investigative interest"—as opposed to aliens identified by the FBI as "of interest" for whom the FBI had no suspicion of a connection to the attacks or terrorism in general. *Id.* at 47.

The OIG Report supports the reasonable inference that this information, known by other DOJ officials, came to the attention of the DOJ Defendants. In particular, the OIG Report specifies that Ashcroft and Mueller were involved in a "'continuous meeting' for the first few

months" after 9/11, at which "the issue of holding aliens until they were cleared was discussed." *Id.* at 39-40. Furthermore, the OIG Report makes clear that the SIOC Working Group, containing representatives from the offices of each of the DOJ Defendants, was aware of the lack of evidence tying detainees to terrorism. *Id.* at 53-57. As we have already noted, the OIG Report details how at some point in October 2001, the SIOC Working Group learned about the New York List and that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." *Id.* at 53. Clearly this created a major problem for the DOJ. The existence of the New York List suddenly presented the possibility of more than doubling the number of detainees subject to the hold-until-cleared policy.[26] It seems quite *plausible* that DOJ officials would confer with the Attorney General and the Director of the FBI (it was, after all, his agents who were arresting out-of-status Arab and Muslim aliens and holding them as if they were "of interest" without any suspicion of terrorist connections) about the problem of the New York List and the hundreds of detainees picked up in contravention of Ashcroft's stated policy. Indeed, it seems to us *implausible* they did not. Finally, the OIG Report once again makes clear that media reports regarding allegations of mistreatment of detainees alleged that detainees remained in detention even though they had no involvement in terrorism. *Id.* at 2, 5.

3. *The Decision to Merge the Lists*

Plaintiffs plausibly plead that, despite the DOJ Defendants' knowledge of the conditions at the ADMAX

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[26] In October and November of 2001, the New York List contained approximately 300 detainees while the INS List for the rest of the nation contained only 200 detainees. OIG Report at 54.

SHU and the lack of any form of verified suspicion for a large number of those detainees on the New York List, Ashcroft approved, or at least endorsed, a decision to merge the New York List. The MDC Plaintiffs contend that he did so notwithstanding vocal opposition from various internal sources. The Complaint clearly alleges that "[a]gainst significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members [on the New York List] be detained until cleared and otherwise treated as 'of interest.'" Compl. ¶47. By taking this action, Ashcroft ensured that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement.

Our dissenting colleague levels a concern as to the import of the merger of the lists and counters that nothing in the OIG reports confirms Ashcroft's personal knowledge of the correlation between the merger of the lists and the lack of individualized suspicion as to the MDC Plaintiffs. The dissent contends that, because Plaintiffs' allegations are not based on personal knowledge, there is no factual basis in the record for them. Dissenting Op., *post* at 45. True enough that Ashcroft did not acknowledge that he was aware of the merger of the lists and its implication for the MDC Plaintiffs, nor did he take responsibility for it. But then again a review of the OIG Report gives no indication that anybody asked him.

The absence of an inquiry to the former Attorney General is not a criticism of the Office of the Inspector General's methods, but a simple recognition of a fact that points out a key difference between our view of the OIG

reports and that of the dissent. For us, the OIG reports provide context for the allegations of the Complaint. See *supra* note 6. However, it would be a mistake to think of the OIG reports as a repository of all relevant facts of that troubled time; but that is exactly what the dissent seems inclined to do. The dissent measures plausibility by the absence or presence of fact-findings in the OIG reports. Thus, for the dissent, the fact that the Attorney General may not have been questioned is confirmation that he knew nothing. The reports make no such assertion.

It may be that following discovery it will be clear that Ashcroft was not responsible for the merger decision (nor was Mueller or Ziglar), but that is not the question at the pleading stage. The question is whether the MDC Plaintiffs plausibly plead that Ashcroft was responsible. Given the importance of the merger and its implications for how his lawful original order was being carried out, we think the MDC Plaintiffs plausibly allege that he was.

Indeed, the OIG Report supports the MDC Plaintiffs' allegation that Ashcroft was responsible for the merger decision. An incident at one of the New York List meetings provides additional context that supports that allegation. At the November 2, 2001 meeting, the group discussed the necessity of CIA checks, often a prerequisite to a 9/11 detainee's release from detention. OIG Report at 55. In response, Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues, stated that he had to "check" before communicating a decision on whether "any detainees could be released without the CIA check." *Id.* at 56. This response could reasonably indicate (a) a lack of authority to respond to the question, or (b) that Levey wanted to consider other views before making the decision. Because

either is plausible, it is irrelevant that only inference (a) supports the conclusion that Levey could not answer the question on his own and had to take it to more senior officials.[27]

Furthermore, in late November 2001, when the INS Chief of Staff approached Levey about the CIA check policy, Levey said that he "did not feel comfortable making the decision about [the] request to change the CIA check policy without additional input." *Id.* at 62. It seems to us that if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance.[28]

The dissent argues that the OIG Report forecloses the plausibility of the allegation that Levey brought the list-

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[27] The OIG Report states that Levey specifically consulted David Laufman, the Deputy Attorney General's Chief of Staff. OIG Report at 62. The dissent takes this as definitive proof that Ashcroft was not consulted on this, or the merger, decision. Dissenting Op., *post* at 47-49. The dissent mischaracterizes our reference to the CIA checks decision. We do not contend that Levey consulted Ashcroft about that decision, nor do we need to. In our view, the fact that Levey spoke to Laufman about that decision is not the end of the matter; indeed, the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list-merger decision on his own.

[28] Indeed, Ziglar told the OIG that he contacted Ashcroft's office on November 7, 2001, to discuss concerns about the process of clearing names from the INS Custody List, especially the impact that merging the lists would have on that process and said that "based on these and other contacts with senior Department officials, he believed the Department was fully aware" of the INS's concerns. OIG Report at 66-67. This also suggests that Levey had communicated those concerns to Ashcroft, who nonetheless made the decision to merge the lists.

merger decision to Ashcroft because "Levey made the lists-merger decision '[a]t the conclusion of the [November 2] meeting' at which the subject was first raised to him." Dissenting Op., *post* at 49 (quoting OIG Report at 56). But the OIG Report does *not* indicate that the merger issue was first raised to Levey at the November 2 meeting. Rather, the OIG Report makes clear that the issue of the New York List was discovered in October 2001,[29] and that the decision to merge the lists was communicated at the November 2 meeting. Thus, surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior* to that meeting.[30] Of course, discovery may show that Levey was solely responsible for the decision. But, again, the question is whether Plaintiffs' allegations support the inference that the decision was Ashcroft's; they do.

The MDC Plaintiffs' allegations against Mueller and Ziglar are also sufficient. The Complaint alleges, *inter*

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[29] While the dissent's observation that Levey did not attend the October 22, 2001 meeting during which the "problems presented by the New York List" were discussed is accurate, it is also irrelevant. See Dissenting Op., *post* at 49-50 (quoting OIG Report at 55). We do not contend that Levey learned about the New York List at the October 22 meeting, but simply that he learned about it *before* the November 2 meeting, giving him time to consult with more senior officials, including Ashcroft, before communicating a decision at that November meeting. Indeed, one would think that Levey would not attend the November 2 meeting without knowing its agenda.

[30] The dissent challenges the sufficiency of Plaintiffs' allegations and our reading of them as "wholly speculative." Dissenting Op., *post* at 48. Of course, Plaintiffs have no way of knowing what Levey and Ashcroft discussed; nor do we. *Iqbal* does not require as much, but rather "sufficient factual matter, accepted as true" to allow the court to draw the reasonable inference that Ashcroft was ultimately responsible for the decision. 556 U.S. at 678. We believe that Plaintiffs have met this burden.

*alia*, that Ashcroft made the decision to merge the lists in spite of the lack of individualized suspicion linking the MDC Plaintiffs to terrorism and that "Mueller and Ziglar were fully informed of this decision, and complied with it." Compl. ¶47; see also *id.* ¶¶55-57, 67. Mueller and Ziglar are not exculpated from this claim merely because Plaintiffs allege that they complied with, as opposed to ordered, the list merger. Plaintiffs plausibly plead that both were aware that the separate list contained detainees for whom the FBI had asserted no interest and that subjecting them to the challenged conditions would be facially unreasonable. Even if an official is not the source of a challenged policy, that official can be held personally liable for constitutional violations stemming from the execution of his superior's orders if those orders are facially invalid or clearly illegal. See, *e.g.*, *Varrone* v. *Bilotti*, 123 F.3d 75, 81 (2d Cir. 1997) (granting defendants qualified immunity where there was "no claim that the order was facially invalid or obviously illegal"). In this instance, Plaintiffs plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful.

4. *Punitive Intent*

The MDC Plaintiffs must show not only that the DOJ Defendants knew of and approved continued use of the ADMAX SHU, but also that they did so with punitive intent—that they endorsed the use of those conditions with an intent to punish the MDC Plaintiffs. Federal courts have long recognized that punitive intent is not often admitted. The Supreme Court has noted that it can be inferred if the conditions of confinement are "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at

539. If the conditions under which one is held have no reasonable connection to a legitimate goal of the state, then one logical assumption is that they are imposed for no other purpose than to punish. See *id.*

The DOJ Defendants argue that even if they knew of the plight of the MDC Plaintiffs, the decision to continue their confinement at the MDC under exceptionally harsh conditions was motivated by national security concerns—a legitimate worry during the days following the 9/11 attacks—and not some animus directed at the MDC Plaintiffs. They seem to imply that once "national security" concerns become a reason for holding someone, there is no need to show a connection between those concerns and the captive other than that the captive shares common traits of the terrorist: illegal immigrant status and a perceived Arab or Muslim affiliation. Indeed, our dissenting colleague asserts that because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that was targeted for recruitment by al Qaeda that they could be held in the ADMAX SHU without any reasonable suspicion of terrorist activity. Dissenting Op., *post* at 64-65, 76-77. Under this view, the MDC Plaintiffs were not held with punitive intent because there was no way to know that they were not involved in terrorist activities. Simply being in the United States illegally and being, or appearing to be, Arab or Muslim was enough to justify detention in the most restrictive conditions of confinement available. Indeed, Levey admitted that the decision to merge the lists, ensuring that some of the 9/11 detainees would be subject to the challenged harsh conditions of confinement, was made because he "wanted to err on the side of caution so that a terrorist would not be released by mistake." OIG Report at 56.

This argument rests on the assumption that if an individual was an out-of-status Arab or Muslim, and someone called the FBI for even the most absurd reason, that individual was considered a possible threat to national security. It presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact. There was no legitimate governmental purpose in holding someone in the most restrictive conditions of confinement available simply because he happened to be—or, worse yet, appeared to be—Arab or Muslim.

To be clear, it is "no surprise"—nor is it constitutionally problematic—that the enforcement of our immigration laws in the wake of 9/11 had a "disparate, incidental impact on Arab Muslims." *Iqbal*, 556 U.S. at 682. And we do not contend that Supreme Court, or our own, precedent requires individualized suspicion to subject detainees to *generally* restrictive conditions of confinement; restriction is an incident of detention. Rather, we simply acknowledge that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. We believe, then, that the challenged conditions—keeping detainees in their cells for twenty-three hours a day, constructively denying them recreation and exposing them to the elements, strip searching them whenever they were removed from or returned to their cells, denying them sleep by bright lights—were not reasonably related to a legitimate goal, but rather were punitive and unconstitutional.

While national security concerns could justify detaining those individuals with suspected ties to terrorism in these challenged conditions for the litany of reasons articulated by the dissent, see Dissenting Op., *post* at 67-68, those concerns do not justify detaining individuals solely on the basis of an immigration violation and their perceived race or religion in those same conditions. Individualized suspicion is required here because, absent some indication that the detainees had a tie to terrorism, the restrictions or conditions of the ADMAX SHU were "arbitrary or purposeless." *Wolfish*, 441 U.S. at 539.[31]

Indeed, in *Wolfish*, the Supreme Court acknowledged that "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his [detention] and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id.* at 539 n.20. That is the situation before us. Clearly detention conditions less restrictive than the ADMAX SHU were feasi-

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[31] The dissent cites several cases that it claims demonstrate that individualized suspicion is not required for imposing restrictive conditions of confinement. Dissenting Op., *post* at 62-63. We do not disagree: individualized suspicion is not required to impose conditions that are reasonably related to a legitimate governmental objective. *Wolfish*, 441 U.S. at 539. Thus, in each of the cases cited by the dissent, rather than announce that individualized suspicion was not required, the Supreme Court determined that the restrictions at issue in each of those cases were related to the legitimate goal of prison security and, therefore, were not punitive. Thus, the cases cited by the dissent do not change our conclusion here, where the challenged conditions—the most restrictive available and imposed on detainees *qua* detainees—are not reasonably related to either the goal of prison security, or national security.

ble for the MDC Plaintiffs, given that the detainees held in the Passaic facility "were not held in isolation or otherwise placed in restrictive confinement." Compl. ¶66. Placing the MDC Plaintiffs in chains and shackles and throwing them in the ADMAX SHU ensured that they posed no threat in the aftermath of 9/11; but we can reach no conclusion other than that the DOJ Defendants' decision to do so was made with punitive intent.

In view of the foregoing, we hold that the MDC Plaintiffs fail to plausibly plead a substantive due process claim against the DOJ Defendants coextensive with the entire post-9/11 investigation and reaching back to the time of Plaintiffs' initial detention. Nonetheless, Plaintiffs' well-pleaded allegations, in conjunction with the OIG Report's documentation of events such as the New York List controversy, render plausible the claim that by the beginning of November 2001, Ashcroft knew of, and approved, the MDC Plaintiffs' confinement under severe conditions, and that Mueller and Ziglar complied with Ashcroft's order notwithstanding their knowledge that the government had no evidence linking the MDC Plaintiffs to terrorist activity. Discovery may ultimately prove otherwise, but for present purposes, the MDC Plaintiffs' substantive due process claim—with the exception of the temporal limitation noted above—may proceed against the DOJ Defendants.

5. *Qualified Immunity*

A defendant is entitled to qualified immunity if he can establish (1) that the complaint fails to plausibly plead that the defendant personally violated the plaintiff's constitutional rights, or (2) that the right was not clearly established at the time in question. See *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009); *Varrone*, 123 F.3d at 78 (noting that the qualified immunity inquiry turns, gener-

ally, on the objective legal reasonableness of a defendant's actions).

For the reasons stated above, the MDC Plaintiffs plausibly plead that the DOJ Defendants violated their substantive due process rights. With regard to the second prong of this inquiry, the law regarding the punishment of pretrial detainees was clearly established in the fall of 2001. As discussed, *Wolfish* made clear that a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. See 441 U.S. at 535-39 & n.20. And in *Hasty*, this Court denied qualified immunity with respect to a materially identical conditions claim against Hasty. 490 F.3d at 168-69. We explained that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Id.* at 169.

*Hasty* further rejected the argument that the post-9/11 context warranted qualified immunity even if it was otherwise unavailable. *Id.* at 159-60, 169. Recognizing the "gravity of the situation" that 9/11 presented, we explained that qualified immunity remained inappropriate because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances. *Id.* at 159. Nothing has undermined the logic or precedential authority of our qualified immunity holding in *Hasty*. We therefore conclude that the DOJ Defendants are not entitled to qualified immunity on the MDC Plaintiffs' conditions of confinement claim.

### C. The MDC Defendants

In his opinion below, Judge Gleeson divided the MDC Plaintiffs' conditions of confinement claim against the MDC Defendants into two categories: "official conditions" allegations and "unofficial abuse" allegations. The "official conditions" allegations concern express confinement policies that the MDC Defendants approved and implemented; the "unofficial abuse" allegations concern the physical and verbal abuse that the MDC Defendants employed or permitted their subordinates to employ. We find this taxonomy helpful in analyzing the conditions claim against Hasty, Sherman, and Zenk.[32]

1. *Official Conditions*

The MDC Plaintiffs generally allege that the "official conditions" to which the MDC Defendants subjected them constituted punishment. We do not address whether Plaintiffs have sufficiently alleged an express intent to punish, but rather analyze whether they have plausibly pleaded that (1) the MDC Defendants caused them to suffer the challenged conditions, and that (2) the challenged conditions were "not reasonably related to a legitimate goal," which allows us to infer punitive intent, *Wolfish*, 441 U.S. at 539.

The MDC Plaintiffs plausibly plead that Hasty and Sherman are personally responsible for and caused the MDC Plaintiffs to suffer the challenged conditions. The Complaint contains allegations that Hasty ordered the creation of the ADMAX SHU and directed two of his subordinates to design "extremely restrictive conditions of confinement." Compl. ¶¶24, 75; see also *id.* ¶76 (de-

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[32] Plaintiffs' allegations against Zenk do not extend to the "unofficial abuse" nor to any harm arising from the "official conditions" that occurred prior to April 22, 2002, the date he became MDC Warden.

scribing the extreme conditions in the ADMAX SHU). According to the Complaint, those conditions were then approved and implemented by Hasty and Sherman. *Id.* ¶75.

The OIG reports support these allegations. While the decision to impose highly restrictive conditions was made at BOP headquarters, OIG Report at 19, MDC officials created the particular conditions imposed, *id.* at 124-25. The reports specify that MDC officials modified one wing of the preexisting SHU to accommodate the detainees and that the ADMAX SHU was "designed to confine the detainees in the most restrictive and secure conditions permitted by BOP policy." Supplemental OIG Report at 2-3. As Warden and Associate Warden of the MDC, Hasty and Sherman had the responsibility to carry out these tasks. But that alone would not sustain liability for either.

However, the MDC Plaintiffs also plausibly plead that Hasty and Sherman subjected them to the challenged conditions with punitive intent because the conditions were "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at 539. Specifically, the MDC Plaintiffs allege that Hasty and Sherman imposed these harsh conditions despite the fact that they "were aware that the FBI had not developed any information to tie the MDC Plaintiffs [and other detainees] they placed in the ADMAX SHU to terrorism." Compl. ¶69. As discussed above with respect to the DOJ Defendants, individualized suspicion was not required to subject detainees to the restrictive conditions of confinement inherent in any detention. But the challenged conditions were not simply restrictive; they were punitive: there is no legitimate governmental purpose in holding someone as if he were a

terrorist simply because he happens to be, or appears to be, Arab or Muslim.

The MDC Defendants, and our dissenting colleague, note that BOP Headquarters ordered that the detainees "be placed in the highest level of restrictive detention" and, thus, argue that we cannot infer punitive intent from the MDC Defendants' compliance with that order. See Dissenting Op., *post* at 70 n.40, 71 (quoting OIG Report at 112). They further claim that because the FBI had designated the individuals held in the ADMAX SHU as "of interest," the MDC Defendants are absolved from liability. See, *e.g.*, Hasty Br. 17, 25-26.

But even if Hasty and Sherman *initially* believed that they would be housing only those detainees who were suspected of ties to terrorism, the Complaint contains sufficient factual allegations that the MDC Defendants eventually knew that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU. Plaintiffs allege that Hasty and Sherman received regular written updates explaining why each detainee had been arrested and including "all evidence relevant to the danger he might pose" to the MDC, and that these updates often lacked any indication of a suspicion of a tie to terrorism. Compl. ¶69.[23] They further explain that "[t]he exact language of these updates was repeated weekly, indicating the continued lack of any information

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[23] For example, the MDC Defendants were informed that Plaintiff Abbasi was "'encountered' by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi." Compl. ¶72.

tying [Plaintiffs] to terrorism, or tending to show that any of them might pose a danger." *Id.* ¶73.

The MDC Plaintiffs relatedly allege that Hasty and Sherman knew that BOP regulations require individualized assessments for detainees placed in the SHU for more than seven days, yet ordered the MDC Plaintiffs' continued detention in the ADMAX SHU without performing these assessments, and Hasty "ordered [his] subordinates to ignore BOP regulations regarding detention conditions." *Id.* ¶68; see also *id.* ¶¶73-74.

The MDC Plaintiffs further allege that Hasty and Sherman approved a document that falsely stated that "executive staff at MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶74. In addition, the MDC Plaintiffs allege that Hasty and Sherman continued to detain them in the ADMAX SHU even after affirmatively learning that the FBI lacked individualized evidence linking Plaintiffs to terrorism. See *id.* ¶¶69-71, 74. These allegations are buttressed by Plaintiffs' assertions that they remained confined in the ADMAX SHU even after receiving final clearance from the New York FBI field office and FBI Headquarters. For instance, the Complaint alleges that Benamar Benatta was cleared on November 14, 2001, that this information was available to the MDC, and that Benatta nonetheless remained in the ADMAX SHU until April 30, 2002. See *id.* ¶188.

The OIG Report directly supports these allegations; as stated by one BOP official, all 9/11 detainees at the MDC were placed in the ADMAX SHU and subjected to the official conditions because, at least initially, "the BOP did not really know whom the detainees were." OIG Report

at 19; see also Compl. ¶4; OIG Report at 112, 126. Specific factual allegations that Hasty and Sherman failed to assess whether the restrictive conditions were appropriate for individual 9/11 detainees buttress the MDC Plaintiffs' claim that the challenged conditions were not reasonably related to a legitimate goal, and that Hasty and Sherman were personally responsible for the treatment.

We recognize that the MDC Defendants may have been in a difficult position when they received detainees without accompanying information regarding those individuals. Record proof may eventually establish that the MDC Plaintiffs' claim is limited to the period of time that Hasty and Sherman knew that the MDC Plaintiffs were being held without suspicion of ties to terrorism. But we cannot conclude, at least at the motion to dismiss stage, that it was reasonable to take a default position of imposing the most restrictive form of detention available when one *lacks* individualized evidence that the detainee poses a danger to the institution or the nation. Accordingly, we conclude that the MDC Plaintiffs plausibly plead a substantive due process claim against Hasty and Sherman as to the official conditions.

The Complaint does not, however, permit an inference of personal liability as to Zenk, who did not become MDC Warden until April 22, 2002, when only two Plaintiffs remained in the ADMAX SHU. Fundamentally, the allegations that personally identify Zenk are too general and conclusory to support Plaintiffs' claim. We therefore dismiss the MDC Plaintiffs' substantive due process claim against Zenk.

2. *Unofficial Abuse*

The district court properly viewed the MDC Plaintiffs' "unofficial abuse" allegations under the deliberate indifference standard commonly applied in the Eighth

Amendment prisoner-mistreatment context. See *Turkmen III*, 915 F. Supp. 2d at 341 & n.13.[34] Given the nature of the MDC Plaintiffs' "unofficial abuse" allegations, premising liability on Hasty and Sherman's deliberate indifference is consistent with *Iqbal*'s holding that *Bivens* defendants are liable only if, through their own actions, they satisfy each element of the underlying constitutional tort. See 556 U.S. at 676.

Prior to *Iqbal*, this Court recognized claims against a supervisory defendant so long as the defendant was personally involved with the alleged constitutional violation. In *Colon* v. *Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), this Court identified five ways in which a plaintiff may establish a defendant's personal involvement. One is through a defendant's "deliberate indifference." *Id.* As the district court explained, the fact that a particular type of conduct constitutes "personal involvement" under *Colon* does not inherently preclude the conduct from also supporting a theory of direct liability. *Turkmen III*, 915 F. Supp. 2d at 335-36. For instance, plausibly pleading that a defendant "participated directly in the alleged constitutional violation"—one form of personal involvement enumerated in *Colon*, 58 F.3d at 873—could establish direct, as opposed to vicarious, liability. The proper inquiry is

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[34] The deliberate indifference standard would clearly apply if the MDC Plaintiffs had been prisoners entitled to the Eighth Amendment's protection against cruel and unusual punishment. See *Walker* v. *Schult*, 717 F.3d 119, 125 (2d Cir. 2013). Because a pretrial detainee's rights are at least as robust as those of a sentenced prisoner, we have applied the Eighth Amendment deliberate indifference test to pretrial detainees bringing claims under the Due Process Clause of the Fifth Amendment. See, *e.g.*, *Cuoco* v. *Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). We do not address whether civil immigration detainees should be governed by an even more protective standard than pretrial criminal detainees.

not the name we bestow on a particular theory or standard, but rather whether that standard—be it deliberate indifference, punitive intent, or discriminatory intent—reflects the elements of the underlying constitutional tort. See *Iqbal*, 556 U.S. at 676 ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.").

Our conclusion is consistent with *Iqbal*, this Court's prior rulings, see *Walker*, 717 F.3d at 125, and the weight of Circuit precedent. For instance, in *Starr* v. *Baca*, 652 F.3d 1202, 1206-07 (9th Cir. 2011), the Ninth Circuit determined that *Iqbal* does not preclude *Bivens* claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference. See also *Dodds* v. *Richardson*, 614 F.3d 1185, 1204-05 (10th Cir. 2010); *Sandra T.E.* v. *Grindle*, 599 F.3d 583, 590-91 (7th Cir. 2010); *Sanchez* v. *Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

The MDC Plaintiffs' "unofficial abuse" claim therefore survives so long as Plaintiffs plausibly plead that the conditions were sufficiently serious, and Hasty and Sherman "kn[e]w of, and disregard[ed], an excessive risk to inmate health or safety." *Walker*, 717 F.3d at 125 (internal quotation marks omitted); accord *Cuoco*, 222 F.3d at 107. The MDC Plaintiffs clearly meet this standard with respect to Hasty. Simply stated, their factual allegations permit the inference that he knew that MDC staff subjected the MDC Plaintiffs to the "unofficial abuses" and permitted—if not facilitated—the continuation of these abuses. See Compl. ¶¶24, 77-78, 107, 109-10.

For example, the Complaint contains allegations that Hasty avoided evidence of detainee abuse by "neglecting to make rounds on the ADMAX [SHU] unit," as was required of him by BOP policy. *Id.* ¶24. The MDC Plain-

tiffs also allege that Hasty was nonetheless made aware of the abuse "through inmate complaints, staff complaints, hunger strikes, and suicide attempts." *Id.*; see also *id.* ¶¶77-78 (detailing how Hasty made it difficult for detainees to file complaints and ignored the evidence when they did, and how staff officials who complained were called "snitches" and were threatened). Indeed, complaints about abuse of 9/11 detainees were pervasive enough to cause the BOP to videotape all detainee movements and resulted in the investigations later detailed in the OIG reports. *Id.* ¶107. The MDC Plaintiffs also complain that Hasty encouraged his subordinates' harsh treatment of the detainees by himself referring to the detainees as terrorists. *Id.* ¶¶77, 109.

The allegations against Sherman, because they are more general and conclusory in nature, are more tenuous. For instance, Plaintiffs allege principally that Sherman "allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there." *Id.* ¶26. These allegations lack a specific factual basis to support a claim that Sherman was aware of the particular abuses at issue. Therefore, we hold that the MDC Plaintiffs fail to plausibly plead an unofficial conditions claim as to Sherman.[35]

3. *Qualified Immunity*

The MDC Defendants claim that qualified immunity is appropriate because they were merely following the orders of BOP superiors, "with the input and guidance of the FBI and INS." See, *e.g.*, Hasty Br. 33. Specifically,

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[35] The MDC Plaintiffs nonetheless maintain a substantive due process claim against Sherman as to the official conditions, as discussed *supra*.

Hasty claims that the "BOP, INS, and FBI officials ordered [him] to place 'high interest' 9/11 detainees in the ADMAX SHU, and directed that they be subject to the 'tightest' security possible." *Id.* He further argues that "[t]he sole basis for the detainees' confinement in the ADMAX SHU—the FBI's investigative interest—was outside the scope of MDC officials' discretion." *Id.* at 35. By extension, he claims that it was reasonable to detain the MDC Plaintiffs and other "high interest" 9/11 detainees in the ADMAX SHU.

These arguments fail. First, as with the DOJ Defendants, our qualified immunity analysis in *Hasty* applies with equal force to the MDC Plaintiffs' conditions claim against Hasty and Sherman in this case. See *Hasty*, 490 F.3d at 168-69. In 2001, it was clearly established that punitive conditions of confinement, like those involved here, could not be imposed on pretrial detainees such as the MDC Plaintiffs. As discussed above with respect to the DOJ Defendants, *Wolfish* made clear that a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. See 441 U.S. at 535-39 & n.20; *Hasty*, 490 F.3d at 169. Furthermore, given the nearly identical claims and circumstances in Hasty and this case, we see no reason to depart from our prior determination that *Hasty* was not entitled to qualified immunity.

Nor is Hasty entitled to qualified immunity with regard to the unofficial conditions claim. As discussed, the MDC Plaintiffs have plausibly alleged that Hasty personally violated their constitutional rights by knowing of, and disregarding, an excessive risk to their health or safety. The right of the MDC Plaintiffs to be free from such unofficial abuse was clearly established at the time

of the events in question. See, *e.g.*, *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause."); see also *Walker*, 717 F.3d at 125, 130; *Cuoco*, 222 F.3d at 106.

Plaintiffs' allegations, the OIG Report, and the MDC Defendants' arguments confirm that Hasty and Sherman housed 9/11 detainees for extended periods of time in highly restrictive conditions without ever obtaining individualized information that would warrant this treatment. Because Plaintiffs' allegations support an inference of punitive intent, and it would be inappropriate to wrestle with competing factual accounts at this stage of the litigation, we hold that a reasonable officer in the MDC Defendants' position would have concluded that this treatment was not reasonably related to a legitimate goal.

## IV. Claim 2: Equal Protection—Conditions Of Confinement

Plaintiffs next assert a claim that Defendants subjected them to the harsh conditions of confinement detailed above based on their race, ethnicity, religion, and/or national origin, in violation of the equal protection guarantee of the Fifth Amendment.[36]

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[36] All Plaintiffs assert an equal protection claim against the DOJ Defendants. Abbasi, Khalifa, Mehmood, and Bajracharya do not assert this claim against Zenk, and Sachdeva and Turkmen do not make this claim against any of the MDC Defendants.

### A. Applicable Legal Standard

To state an equal protection violation under the Fifth Amendment, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. "[P]urposeful discrimination requires more than intent as volition or intent as awareness of consequences." *Id.* (internal quotation marks omitted). "It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." *Id.* at 676-77 (alteration in original) (internal quotation marks omitted).

A plaintiff can show intentional discrimination by: (1) "point[ing] to a law or policy that expressly classifies persons on the basis of" a suspect classification; (2) "identify[ing] a facially neutral law or policy that has been applied in an intentionally discriminatory manner[;]" or (3) "alleg[ing] that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus." *Brown* v. *City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) (internal quotation marks omitted).

The district court characterized Plaintiffs' equal protection claim as falling within the first category—that is, a claim that Defendants subjected Plaintiffs to the challenged conditions of confinement pursuant to a policy that expressly classified Plaintiffs on the basis of their race, ethnicity, religion, and/or national origin. Given our reading of Plaintiffs' allegations and arguments on appeal, we will not analyze this claim, particularly as it relates to the MDC Defendants, under the first equal protection theory alone.

**B. The DOJ Defendants**

The district court concluded that Plaintiffs failed to state an equal protection claim against the DOJ Defendants, but "f[ou]nd the issue to be a close one." *Turkmen III*, 915 F. Supp. 2d at 345. In view of our analysis of Plaintiffs' substantive due process claim against the DOJ Defendants, and particularly these Defendants' roles with respect to the merger of the New York List, we hold that the MDC Plaintiffs have adequately alleged an equal protection claim against Ashcroft, Mueller, and Ziglar.

Plaintiffs' well-pleaded allegations and the OIG Report give rise to the following reasonable inferences, which render plausible the MDC Plaintiffs' equal protection claim against the DOJ Defendants: (1) the New York FBI field office discriminatorily targeted individuals in the 9/11 investigation not based on individualized suspicion, but rather based on race, ethnicity, religion, and/or national origin, and those individuals were then placed on the New York List; (2) the DOJ Defendants knew about the discriminatory manner in which the New York FBI field office placed individuals on the New York List; and (3) the DOJ Defendants condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subjected to the challenged conditions of confinement.

Plaintiffs allege that the New York FBI field office targeted individuals in the PENTTBOM investigation and placed them on the New York List based on race, ethnicity, religion, and/or national origin. "[T]he head of the New York FBI field office stated that an individual's Arab appearance and status as a Muslim were factors to consider in the investigation." Compl. ¶42. Even more telling, a supervisor in the same local FBI office, "who

oversaw the clearance process[,] stated that a tip about Russian tourists filming the Midtown tunnel was 'obviously' of no interest, but that the same tip about Egyptians was of interest." *Id.* Individuals who were arrested by the New York FBI and INS in connection with a PENTTBOM lead were automatically treated as "of interest," OIG Report at 40-41, and were placed on the New York List, see *id.* at 53.

This discriminatory approach, focusing on "an individual's Arab appearance," Compl. ¶42, is consistent with what is alleged to have occurred in Bajracharya's case. Bajracharya, who as noted, is a Buddhist and native of Nepal, came to the FBI's attention when an employee from the Queens County District Attorney's Office "observed an '[A]rab male' videotaping outside a Queens[ ] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶230. Investigators from the District Attorney's Office questioned Bajracharya about "why he was taking pictures," and Bajracharya "tried to explain that he was a tourist." *Id.* He was arrested after acknowledging he overstayed his visa and was detained in the ADMAX SHU. Given the Complaint's allegations regarding the New York FBI's tactics, it is reasonable to infer that officials in the New York FBI targeted certain individuals, including Plaintiffs, for investigation, arrest, and placement on the New York List simply because they were, or appeared to be, Arab or Muslim, *and not* because of any suspicion regarding a link to terrorism.

As we conclude above with respect to the substantive due process claim, the DOJ Defendants were informed of the problems presented by the New York List. As noted, the OIG Report reveals that by October 2001 the SIOC Working Group learned about the New York List and

that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." OIG Report at 53. Plaintiffs allege that a high-ranking DOJ official noted that individuals were detained "without any attempt" to determine if they were of "actual interest," and that the official "was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity." Compl. ¶45. The DOJ Defendants were unlikely to have remained unaware of these concerns, as they "received detailed daily reports of the arrests and detentions," *id.* ¶47, see also *id.* ¶¶63-64, and Mueller "was in daily contact with the FBI field offices regarding the status of individual clearances," *id.* ¶57. In light of these allegations, we can reasonably infer that these Defendants were aware that the New York FBI field office was placing individuals on the New York List not because of any suspected ties to terrorism but rather because they were, or were perceived to be, Arab or Muslim.

While the DOJ Defendants' mere knowledge of this discriminatory action by the New York FBI field office would be insufficient to allow for the reasonable inference that these Defendants possessed the discriminatory purpose required to state an equal protection claim, Plaintiffs' allegations are not limited to the DOJ Defendants' knowledge alone. Rather, as we discuss in detail in the substantive due process analysis above, Plaintiffs plausibly plead that Ashcroft made the decision to merge the New York List with the national INS List, ensuring that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement. Plaintiffs further allege that Mueller and Ziglar were aware that the New York List contained detainees against whom the FBI had asserted

no interest and that subjecting them to the challenged conditions would be facially unreasonable. In ordering and complying with the merger of the New York List, the DOJ Defendants actively condoned the New York FBI field office's discriminatory formulation of that list.

The DOJ Defendants' condonation of the New York FBI field office's purposeful discrimination allows us to reasonably infer at the motion to dismiss stage that the DOJ Defendants themselves acted with discriminatory purpose. The Supreme Court in *Iqbal* stated that "discrete wrongs—for instance, beatings—by lower level Government actors[] ... if true, and if condoned by [Ashcroft and Mueller], could be the basis for some inference of wrongful intent on [Ashcroft and Mueller's] part." 556 U.S. at 683. In a similar vein, we have held, in a case involving an equal protection claim under 42 U.S.C. § 1983, that a reasonable factfinder could conclude that the Commissioner of the Fire Department of the City of New York intended to discriminate when he decided to continue to use the results of employment examinations that he knew had a disparate impact based on race. See *United States* v. *City of New York*, 717 F.3d 72, 94 (2d Cir. 2013). Here, it is reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement.

Contrary to the dissent's contentions, see Dissenting Op., *post* at 76-78, this case is distinguishable from *Iqbal*, where the Supreme Court concluded that the plaintiff failed to state an equal protection claim. In *Iqbal*, there

were "more likely explanations" for why the plaintiff was detained in harsh conditions other than his race, religion, or national origin. 556 U.S. at 681. Those more likely explanations for the plaintiff's treatment, according to the Supreme Court, were that Ashcroft and Mueller supported "a legitimate policy . . . to arrest and detain individuals *because of their suspected link to the attacks*," which "produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682 (emphasis added). The Supreme Court noted that "*[o]n the facts respondent alleges* the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States *and who had potential connections to those who committed terrorist acts.*" *Id.* (emphasis added); see also *id.* at 683 (noting that all the allegations in *Iqbal* "suggest[ed] is that the Nation's top law enforcement officers . . . sought to keep *suspected terrorists* in the most secure conditions available until the suspects could be cleared of terrorist activity" (emphasis added)).

In this case, unlike in *Iqbal*, it is not "more likely" that the MDC Plaintiffs were detained in the challenged conditions *because of* their suspected ties to the 9/11 attacks. Indeed, as discussed at length earlier, Plaintiffs have plausibly alleged that they were detained without *any* suspicion of a link to terrorist activity and that the DOJ Defendants knew that the government lacked information tying Plaintiffs to terrorist activity, but decided to merge the lists anyway.[37] Thus, unlike in *Iqbal*, there was

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[37] Given the clear language used by the Supreme Court in *Iqbal* regarding the detainees' connections to terrorism, 556 U.S. at 682-83, we understand the *Iqbal* Court to have rejected as conclusory the allegation in the *Iqbal* complaint identified by the dissent, which only

no legitimate reason to detain the MDC Plaintiffs in the challenged conditions and, thus, no obvious, more likely explanation for the DOJ Defendants' actions with respect to the New York List merger.[38]

The dissent also argues that we cannot plausibly infer the DOJ Defendants' discriminatory intent from the merger decision because not all of the individuals on the New York List were subjected to the same level of restrictive confinement. See Dissenting Op., *post* at 79-80. But the fact that some individuals of the same race, ethnicity, religion, and/or national origin as the MDC Plaintiffs were restrained in the Passaic County Jail, as opposed to the ADMAX SHU, hardly dooms the MDC Plaintiffs' claim against the DOJ Defendants. There is no allegation that the DOJ Defendants were responsible for the assignment of certain actual or perceived Arab and Muslim males to Passaic as opposed to the more restrictive ADMAX SHU. See OIG Report at 17-18, 126-27, 158

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pleads in the broadest terms that the *Iqbal* plaintiffs were confined without "any individual determination" that such restrictions were "appropriate or should continue." See Dissenting Op., *post* at 81-82 (quoting First Am. Compl. ¶ 97, App. to Pet. for Cert. 173a, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), available at http://1.usa.gov/1CfHJQF). Here, in contrast, the well-pleaded allegations, as supported by the OIG reports, allege that the DOJ Defendants made, and complied with, the decision to merge the New York List with the national INS List, thereby ensuring that the MDC Plaintiffs, and others, remained in the challenged conditions of confinement despite the absence of any suspicion that they were tied to terrorism.

[38] Furthermore, the fact that Plaintiffs plausibly plead that the DOJ Defendants merged the New York List, and complied with the list merger, based on punitive intent (the substantive due process claim) arguably suggests the plausibility of the MDC Plaintiffs' allegations that the DOJ Defendants also possessed the discriminatory intent required for an equal protection claim. See *supra* Section III.B.

(noting that assignment responsibility fell largely to the arresting FBI agent). Rather, Plaintiffs have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List. The DOJ Defendants, apparently deferring to others' designation of detainees for particular facilities, thus ensured that some (and for all they knew, all) of the individuals on the New York List would be subjected to the challenged conditions of confinement solely on the basis of discriminatory criteria. The fact that some of these individuals were actually assigned to the less restrictive Passaic facility is thus a red herring.[39]

Based on the foregoing, we conclude that the MDC Plaintiffs' allegations are sufficient to state an equal protection claim against Ashcroft, Mueller, and Ziglar for their condonation of the New York FBI's discriminatory formulation of the New York List, which resulted in the MDC Plaintiffs being subjected to the conditions of confinement challenged here.

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[39] Moreover, to the extent this differential assignment of class members, again apparently by agents of the New York FBI and not the DOJ Defendants, might be relevant to Plaintiffs' equal protection claim, because it could suggest that the New York FBI was not actually discriminating, it is more appropriately considered at summary judgment. Indeed, the cases embraced by the dissent conclude that evidence of differential treatment of members of the same class may weaken an inference of discrimination *at the summary judgment stage*. See *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 309 (1996) (summary judgment); *Fleming* v. *MaxMara USA, Inc.*, 371 F. App'x 115, 116 (2d Cir. 2010) (summary order) (summary judgment); *James* v. *N.Y. Racing Ass'n*, 233 F.3d 149, 151 (2d Cir. 2000) (summary judgment). In light of the well-pleaded allegations regarding discrimination by the New York FBI, Plaintiffs have hardly pleaded themselves out of court on this point.

### C. The MDC Defendants

We agree with the district court that the MDC Plaintiffs have stated a plausible equal protection claim against Hasty and Sherman, although we base our decision on somewhat different reasoning than that employed by the court below. However, we do not agree with the district court that the MDC Plaintiffs have adequately alleged this claim against Zenk.

Our conclusion focuses on allegations of mendacity by Hasty and Sherman regarding the basis for detaining the MDC Plaintiffs in the ADMAX SHU. The Complaint asserts that Hasty and Sherman "were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerousness or risk was unlawful." Compl. ¶74. However, these Defendants never actually undertook that "required individualized assessment." *Id.* ¶73. Nevertheless, Hasty and Sherman approved a document that "untruthfully stated that the executive staff at [the] MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶74. In fact, neither Hasty nor Sherman "saw or considered information in any of these categories in deciding to place the 9/11 detainees in the ADMAX SHU." *Id.*;[40] see also *id.* ¶¶68-72 (Hasty and Sherman held the MDC Plaintiffs in the ADMAX SHU knowing that they were not tied to terrorism and without performing the re-

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[40] As previously noted, the term "9/11 detainees" is defined in the Complaint as noncitizens from the Middle East, South Asia, and elsewhere who are Arab or Muslim, or were perceived to be Arab or Muslim. Individuals with certain of these characteristics who were arrested and detained in response to the 9/11 attacks constitute the putative class in this case.

quired individualized assessment of whether Plaintiffs posed a danger to the facility).

Based on the foregoing allegations of duplicity regarding the basis for confining the 9/11 detainees, it is reasonable to infer that Hasty and Sherman approved this false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU based on discriminatory intent. *Cf. Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (in the employment discrimination context, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"); *id.* (an inference of discriminatory purpose based on an employer's false explanation "is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt" (internal quotation marks omitted)); *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993) ("disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . show intentional discrimination" in the employment discrimination context).

The dissent argues that we cannot infer discriminatory intent from the MDC Defendants' approval of this false document, concluding that the "more likely" reason for this mendacity is these Defendants' concern for national security. See Dissenting Op., *post* at 83-84. Although recognizing that the MDC Defendants might be faulted for approving a false document stating that each detainee had been assessed as a "High Security" "suspected terrorist[ ]," our dissenting colleague believes Hasty and Sherman's actions are more likely explained by reliance on the FBI's designation of each MDC Plain-

tiff as a person "of interest" or "of high interest" to the ongoing terrorism investigation. Yet, the allegations in the Complaint belie this alternative explanation for Hasty and Sherman's dishonesty. Plaintiffs allege that the "MDC Defendants were aware that the FBI had not developed *any information*" to tie the 9/11 detainees to terrorism. Compl. ¶69 (emphasis added). Indeed, the MDC Defendants received regular updates on the FBI's investigation, *including* the dearth of evidence connecting the 9/11 detainees to terrorism. Such briefing—placing Hasty and Sherman on repeated notice of the lack of any specific information justifying restrictive confinement in the ADMAX SHU—renders implausible the innocent explanation for their mendacity.

As an additional matter, the fact that the false document that Hasty and Sherman approved, on its face, applied to suspected terrorists and not just actual or perceived Arabs and Muslims does not undermine the reasonableness of the inference that these Defendants acted based on discriminatory intent. Plaintiffs allege that Hasty and Sherman approved the document even though they had not performed the required individualized assessments and knew that keeping "the 9/11 detainees" in the ADMAX SHU without those assessments was unlawful. *Id.* ¶¶73-74. They further allege that, in approving the document, Hasty and Sherman failed to consider the past offenses, past terrorist activity, and inability to adapt to incarceration with respect to "the 9/11 detainees." *Id.* ¶74. Based on Plaintiffs' allegations about how the false document related in particular to the 9/11 detainees, a group the Complaint specifically defines on racial, ethnic, and religious grounds, see *id.* ¶1, it is reasonable to infer, at least at the motion to dismiss stage, that

Hasty and Sherman lied in order to conceal an intent to discriminate on the basis of suspect classifications.

Further buttressing this inference, the Complaint asserts that MDC staff used racially, ethnically, and religiously charged language to refer to the MDC Plaintiffs. See *id.* ¶109 (MDC staff referred to the MDC Plaintiffs as terrorists and insulted their religion); *id.* ¶110 (Saeed Hammouda and others complained "that MDC staff called them 'camel[s]'"); *id.* ¶136 (MDC staff mocked Plaintiffs' prayers and interrupted their praying by "screaming derogatory anti-Muslim comments"); *id.* ¶218 (during his transport and processing Hammouda was called "Arabic asshole"). These allegations are supported by the OIG reports. See OIG Report at 144 (noting allegations that MDC officers used racial slurs); Supplemental OIG Report at 28-30 (concluding that some MDC staff verbally abused detainees based on their Muslim faith, among other grounds).

The context in which the term "terrorist" was used at the MDC bolsters the inference that the MDC Plaintiffs were believed to be terrorists simply because they were, or were perceived to be, Arab or Muslim. Significantly, the term "terrorist" was not used in isolation. Rather, MDC staff called the MDC Plaintiffs "'fucking Muslims' and 'terrorists,'" Compl. ¶147, as well as "'terrorist' and 'Arabic asshole,'" *id.* ¶218; see also Supplemental OIG Report at 28 (noting that along with the term "terrorists," MDC staff referred to detainees as "fucking Muslims" and "bin Laden Junior" (internal quotation marks omitted)).

While most of the aforementioned comments are not directly attributed to Hasty, Sherman, or Zenk, Plaintiffs do allege that the use of racially, ethnically, and religiously charged language was brought to the attention of the

MDC Defendants through detainee complaints and reports from MDC staff, among other means. Mere knowledge of the MDC staff's discriminatory comments, of course, is insufficient to infer shared discriminatory intent by Hasty, Sherman, or Zenk. See *Iqbal*, 556 U.S. at 676-77. However, with respect to Hasty, Plaintiffs allege more than mere awareness of the MDC staff's discriminatory treatment of the MDC Plaintiffs. Plaintiffs claim that Hasty fostered the MDC staff's use of discriminatory language to refer to the MDC Plaintiffs by himself "referring to the detainees as 'terrorists,'" Compl. ¶77, see also *id.* ¶109, notwithstanding Hasty's knowledge that the MDC Plaintiffs lacked ties to terrorism. Hasty's knowledge about the charged manner in which the term "terrorist" was used to refer to the MDC Plaintiffs, and his personal use of the term in that context, renders even more plausible the conclusion that he approved the false document justifying the MDC Plaintiffs' detention in the ADMAX SHU based on discriminatory animus. Given the fact that the 9/11 hijackers were Arab Muslims, and Hasty knew that there were no articulable ties between the MDC Plaintiffs and terrorism, Plaintiffs plausibly plead that Hasty referred to the MDC Plaintiffs as terrorists, and treated them as if they were, simply because they were, or he believed them to be, Arab or Muslim.

In view of the foregoing, the MDC Plaintiffs have stated a plausible claim that Hasty and Sherman detained them in the challenged conditions because of their race, ethnicity, religion, and/or national origin. These Defendants' approval of the false document, and Hasty's use of charged language in the particular context of the MDC Plaintiffs' detention, support the reasonable inference that Hasty and Sherman subjected the MDC Plain-

tiffs to harsh conditions of confinement based on suspect classifications.

With respect to Zenk, the MDC Plaintiffs' allegations are more limited and fail to support the reasonable inference that he established or implemented the alleged conditions of confinement based on animus that offends notions of equal protection.

**D. Qualified Immunity**

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' equal protection claim. With regard to the first prong of this inquiry, whether the complaint plausibly pleads that a defendant personally violated the plaintiff's constitutional rights, for the reasons stated above, the MDC Plaintiffs have plausibly alleged that Ashcroft, Mueller, Ziglar, Hasty, and Sherman violated their rights under the equal protection guarantee.

With respect to the second prong of the inquiry, it was clearly established at the time of Plaintiffs' detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin. Plaintiffs' right "not to be subjected to ethnic or religious discrimination[ ] w[as] . . . clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event." *Hasty*, 490 F.3d at 160. In *Hasty*, the plaintiff alleged "that he was deemed to be 'of high interest,' and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion," and "that Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." *Id.* at 174 (alterations in original). We concluded "that any reasonably competent officer would understand [those alleged ac-

tions] to have been illegal under prior case law." *Id.* (internal quotation marks omitted). There is no reason that this analysis should not govern here. Although, as the dissent notes, see Dissenting Op., *post* at 62, *Hasty* employed a more lenient pleading standard than what we now utilize in assessing factual allegations, this hardly prevents us from relying on its conclusions as to whether certain legal principles were clearly established at the time of Plaintiffs' detention. Accordingly, in view of the sufficiency of the MDC Plaintiffs' allegations here, the DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim.

We reverse the portion of the district court's decision that dismissed the MDC Plaintiffs' equal protection claim against the DOJ Defendants, affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' claim, and reverse the district court's decision denying Zenk's motion to dismiss the equal protection claim.

Because the Passaic Plaintiffs were held in the general population and not the ADMAX SHU, we agree with the district court that they have failed to adequately plead that they were subjected to harsh conditions of confinement because of their race, ethnicity, religion, and/or national origin. Thus, we affirm the district court's dismissal of the Passaic Plaintiffs' equal protection claim.

## V. Claim 6: Unreasonable And Punitive Strip Searches

The MDC Plaintiffs claim that they were subject to unreasonable and punitive strip searches while detained

at the MDC, in violation of the Fourth and Fifth Amendments.[41]

### A. Applicable Legal Standard

Determining the legal standard that applies to this claim turns on whether the MDC Plaintiffs were held in a prison or a jail. See *Hasty*, 490 F.3d at 172. In *Hasty*, we decided that the plaintiff, who was detained in the ADMAX SHU at the MDC (like the MDC Plaintiffs here), should be treated in accordance with the standard governing prisons. See *id.* Under that standard, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Given that the parties here do not argue for a different standard, we assume that the foregoing standard applies in this case.[42]

### B. The MDC Defendants

The MDC Plaintiffs allege that Defendant Joseph Cuciti, a former lieutenant at the MDC and not a party on

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[41] Only the MDC Plaintiffs assert this claim, which is only raised against the MDC Defendants. Benatta and Hammouda alone assert this claim against Zenk. To the extent that the MDC Plaintiffs' allegations regarding the strip searches are cognizable under the Fifth Amendment, we factor these allegations into our analysis of the substantive due process claim, which is discussed above. See *supra* Section III.C.

[42] We note, however, that this standard governs prison regulations, see *Turner*, 482 U.S. at 89, and that the application of this standard in *Hasty* may have been justified because the plaintiff in that case faced criminal charges (apparently felonies), see 490 F.3d at 147-48 & n.1, 162 n.8, 172. In contrast, Plaintiffs here were almost exclusively charged with civil immigration violations and were detained on that basis. While it may be that a different standard, one more favorable to detainees, should govern the constitutionality of searches in the context of civil immigration detention, we leave that question for another day.

appeal, was tasked with "developing the strip search policy on the ADMAX [SHU]." Compl. ¶111. Plaintiffs further claim that "Hasty ordered . . . Cuciti to design extremely restrictive conditions of confinement." *Id.* ¶75. The reasonable inference based on these allegations is that Hasty ordered Cuciti to develop the strip-search policy, which was "then approved and implemented by Hasty and Sherman, and, later, by Zenk." *Id.*

Plaintiffs allege that the 9/11 detainees at the MDC were strip searched upon arrival, and again after they had been escorted in shackles and under continuous guard to the ADMAX SHU. They were also strip searched every time they were taken from or returned to their cells, including after non-contact attorney visits, when "physical contact between parties was prevented by a clear partition," OIG Report at 123, and when being transferred from one cell to another. Benatta was strip searched on September 23, 24, and 26 of 2001, even though he was not let out of his cell on any of those days. Numerous strip searches were documented in a "visual search log" that was created for review by MDC management, including Hasty. Compl. ¶114 (internal quotation marks omitted).

Plaintiffs' allegations regarding the strip searches are supported by the Supplemental OIG Report, which concluded that MDC staff "inappropriately used strip searches to intimidate and punish detainees." Supplemental OIG Report at 35. That report also "questioned the need for the number of strip searches, such as after attorney and social visits in non-contact rooms." *Id.*

The foregoing allegations, supported as they are by the Supplemental OIG Report, are sufficient to establish at this stage of the litigation that Hasty and Sherman were personally involved in creating and executing a

strip-search policy that was not reasonably related to legitimate penological interests. Hasty ordered the policy, and both he and Sherman approved and implemented it. Under that policy, the MDC Plaintiffs were strip searched when there was no possibility that they could have obtained contraband. Plaintiffs have alleged that Hasty and Sherman were aware of these searches either based on the search log that was created for review by MDC management, or because they were involved in the implementation of the strip-search policy.[43] These allegations give rise to a plausible Fourth Amendment claim against Hasty and Sherman. See *Hasty*, 490 F.3d at 172 (finding a plausible allegation of a Fourth Amendment violation in the post-9/11 context where the plaintiff alleged that he "was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, [he] was subjected to three serial strip and body-cavity searches in the same room"); *Hodges* v. *Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (noting that because "there was no possibility that [the plaintiff] could have obtained and concealed contraband[ ] ... the second search appears to have been unnecessary").[44]

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[43] To the extent the dissent believes that we premise Hasty and Sherman's personal involvement entirely on these Defendants' alleged review of the visual search log, see Dissenting Op., *post* at 90, that assertion is incorrect. As discussed, Plaintiffs have plausibly alleged that Hasty ordered the development of, and that he and Sherman approved and implemented, the challenged strip-search policy. Plaintiffs' allegations regarding the visual search log only buttress the inference of Hasty's personal involvement.

[44] Although the dissent correctly notes that *Hodges* was decided before the Supreme Court's opinion in *Turner*, see Dissenting Op., *post* at 88, we have ratified *Hodges* in subsequent strip search case law. See *Hasty*, 490 F.3d at 172; *N.G.* v. *Connecticut*, 382 F.3d 225, 233-34 (2d Cir. 2004). Similarly, we reject the dissent's attempt to confine *Hodges* to its facts, only finding the absence of a legitimate penologi-

With respect to Zenk, however, the MDC Plaintiffs fail to state a plausible Fourth Amendment claim. As noted earlier, Plaintiffs do not assert any claim against Zenk for injuries they suffered prior to the date on which he became Warden of the MDC, which was April 22, 2002. Only two Plaintiffs, Benatta and Hammouda, were still detained at the MDC as of that date. These Plaintiffs have not sufficiently alleged that they were unlawfully strip searched during the period in which Zenk was Warden of the MDC.

**C. Qualified Immunity**

Hasty and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' strip search claim. With respect to the first prong of the qualified immunity analysis, Plaintiffs have plausibly alleged that Hasty and Sherman each violated the MDC Plaintiffs' rights under the Fourth Amendment. With regard to the second prong of the inquiry, Plaintiffs' Fourth Amendment rights were clearly established at the time of the searches at issue.

In *Hasty*, we denied Hasty qualified immunity on the plaintiff's Fourth Amendment claim, stating that in the wake of 9/11 "it was clearly established that even the standard most favorable to prison officials required that strip and body-cavity searches be rationally related to le-

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cal purpose where the strip searches are "*immediately* successive." Dissenting Op., *post* at 88 (emphasis added). Like previous panels, we read *Hodges* as holding that a search may be unnecessary and purposeless where "there was no possibility that [the plaintiff] could have obtained and concealed contraband." 712 F.2d at 35; see also *N.G.*, 382 F.3d at 233-34. Here, consistent with *Hodges*, Plaintiffs have plausibly alleged that they were strip searched when there was no opportunity to acquire contraband, including in instances where they were shackled and under escort, or were never permitted to leave their cells.

gitimate government purposes." 490 F.3d at 172; see also *id.* at 159-60 (the "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" was "clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event"). Because the MDC Plaintiffs' claim here is substantially the same as the Fourth Amendment claim at issue in *Hasty*, we are bound by that decision and thus deny Hasty and Sherman qualified immunity on the Fourth Amendment claim in this case.

Accordingly, we affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' Fourth Amendment strip search claim, and reverse the district court's denial of Zenk's motion to dismiss this claim.

## VI. Claim 7: Conspiracy Under 42 U.S.C. § 1985

Plaintiffs' final claim is that Defendants conspired to deprive them of their rights in violation of 42 U.S.C. § 1985(3).

### A. Applicable Legal Standard

A conspiracy claim under Section 1985(3) has four elements: "(1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen." *Hasty*, 490 F.3d at 176.[45] In addition, this claim requires that "there

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[45] Section 1985(3) of Title 42 of the United States Code provides, in pertinent part, that:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any

must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971); accord *Reynolds* v. *Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012).

**B. The Sufficiency of the Allegations**

In this case, the MDC Plaintiffs have sufficiently alleged that Ashcroft, Mueller, and Ziglar met regularly and eventually agreed to subject the detainees to the challenged conditions of confinement by merging, and complying with the merger of, the New York List. The MDC Plaintiffs have also plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim, as we conclude above in our analysis of the equal protection claim. With respect to Hasty and Sherman, their joint approval of the false document without performing the requisite individualized assessment supports the reasonable inference that these two Defendants came to an agreement to and did subject Plaintiffs to harsh conditions of confinement based on the discriminatory animus required by Section 1985(3).

Plaintiffs also allege an agreement, albeit not an explicit one, among the DOJ Defendants and Hasty and Sherman to effectuate the harsh conditions of confinement with discriminatory intent. Such a tacit agreement

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person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

can suffice under Section 1985(3). See *Webb* v. *Goord*, 340 F.3d 105, 110-11 (2d Cir. 2003). The Complaint asserts that the conditions of confinement at the MDC "were formulated in consultation with the FBI." Compl. ¶65. In addition, Hasty ordered, and Hasty and Sherman approved and implemented, the conditions of confinement "[t]o carry out Ashcroft, Mueller[,] and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment." *Id.* ¶75; see also *id.* ¶68. The foregoing allegations are sufficient to support the reasonable inference that the DOJ Defendants, Hasty, and Sherman shared such a tacit understanding about carrying out the unlawful conduct with respect to the MDC Plaintiffs' detention.

Accordingly, the MDC Plaintiffs' allegations state a plausible claim for a Section 1985(3) conspiracy against Ashcroft, Mueller, Ziglar, Hasty, and Sherman.

**C. The Intracorporate Conspiracy Doctrine**

The MDC Defendants argue that they are legally incapable of conspiring with each other, and with the DOJ Defendants, because they are all part of the same governmental entity—the DOJ. In *Girard* v. *94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70-72 (2d Cir. 1976), we recognized that the defendants—officers and directors of a single corporation, and the corporation itself—could not legally conspire with one another in violation of Section 1985(3). We reached that conclusion because the defendants formed a "single business entity with a managerial policy implemented by the one governing board." *Id.* at 71. Thus, the defendants could not satisfy the statutory requirement of a conspiracy between two or more persons. *Id.* We also noted, however, that where various entities in a single institution have "disparate responsibilities and functions," a conspiracy claim could lie because

the actions of those entities would not be "actions of only one policymaking body." *Id.*

Assuming that Defendants can ultimately invoke the intracorporate conspiracy doctrine in this case, at this stage of the litigation, we cannot conclude that Ashcroft, Mueller, Ziglar, Hasty, and Sherman acted as members of a single policymaking entity for purposes of the MDC Plaintiffs' Section 1985(3) conspiracy claim. According to the Complaint, the former Attorney General, the former Director of the FBI, the former Commissioner of the INS, and the former Warden and Associate Warden at the MDC had varied responsibilities and functions that distinguish them from the single corporate entity in *Girard*. Although Hasty and Sherman may have acted, at least in part, to implement the DOJ Defendants' policy, it is also the case that Hasty and Sherman themselves established policies at the MDC. Thus, factual questions about how disparate or distinct Defendants' functions were, and how policy was created by the various Defendants, preclude us from deciding as a matter of law that Defendants resemble the single policymaking body of a corporation.[46]

**D. Qualified Immunity**

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim. First, the

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[46] We note that the BOP and, therefore, the MDC, are subject to the supervision of the Attorney General. See 18 U.S.C. § 4041. We have also found one unpublished district court decision that concludes that the Attorney General and employees of a BOP facility cannot conspire together under Section 1985. See *Chesser* v. *Walton*, No. 12-cv-01198-JPG, 2013 WL 1962285, at *3 (S.D. Ill. May 10, 2013). However, for the reasons stated above, neither this statutory provision nor district court case satisfy us that Defendants here were sufficiently similar to the members of a single corporate policymaking body such that the intracorporate conspiracy doctrine should apply.

MDC Plaintiffs have plausibly alleged a Section 1985(3) conspiracy claim against these Defendants. In addition, as we concluded in *Hasty*, in the wake of the 9/11 attacks, "even without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." 490 F.3d at 177. In that case, we denied the defendants qualified immunity on the Section 1985(3) claim. See *id.* Given the sufficiency of the allegations in this case, our qualified immunity decision in *Hasty* controls here.

Accordingly, we reverse the district court's dismissal of the Section 1985(3) claim against the DOJ Defendants and affirm the denial of Hasty and Sherman's motions to dismiss this claim. Because the MDC Plaintiffs fail to adequately plead that Zenk acted with discriminatory animus, we reverse the denial of Zenk's motion to dismiss the conspiracy claim. This claim is also dismissed with respect to the Passaic Plaintiffs, as they fail to adequately plead that Defendants acted with the requisite discriminatory animus.

## VII. Final Thoughts

If there is one guiding principle to our nation it is the rule of law. It protects the unpopular view, it restrains fear-based responses in times of trouble, and it sanctifies individual liberty regardless of wealth, faith, or color. The Constitution defines the limits of the Defendants' authority; detaining individuals as if they were terrorists, in the most restrictive conditions of confinement available, simply because these individuals were, or appeared to be, Arab or Muslim exceeds those limits. It might well be that national security concerns motivated the Defendants

to take action, but that is of little solace to those who felt the brunt of that decision. The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy.

Holding individuals in solitary confinement twenty-three hours a day with regular strip searches because their perceived faith or race placed them in the group targeted for recruitment by al Qaeda violated the detainees' constitutional rights. To use such a broad and general basis for such severe confinement without any further particularization of a reason to suspect an individual's connection to terrorist activities requires certain assumptions about the "targeted group" not offered by Defendants nor supported in the record. It assumes that members of the group were already allied with or would be easily converted to the terrorist cause, until proven otherwise. Why else would no further particularization of a connection to terrorism be required? Perceived membership in the "targeted group" was seemingly enough to justify extended confinement in the most restrictive conditions available.

Discovery may show that the Defendants—the DOJ Defendants, in particular—are not personally responsible for detaining Plaintiffs in these conditions. But we simply cannot conclude at this stage that concern for the safety of our nation justified the violation of the constitutional rights on which this nation was built. The question at this stage of the litigation is whether the MDC Plaintiffs have plausibly pleaded that the Defendants exceeded the bounds of the Constitution in the wake of 9/11. We believe that they have.

## CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the district court's decision on Defendants' Rule 12(b)(6) motions. More specifically, we conclude that: (1) the MDC Plaintiffs have plausibly alleged a substantive due process claim against the DOJ Defendants, against Hasty with regard to both official and unofficial conditions, and against Sherman with regard to official conditions only, and these Defendants are not entitled to qualified immunity on this claim; (2) the MDC Plaintiffs have plausibly alleged an equal protection claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (3) the free exercise claim is dismissed as to all Defendants; (4) the MDC Plaintiffs have plausibly alleged their Fourth Amendment strip search claim against Hasty and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (5) the MDC Plaintiffs have plausibly alleged the Section 1985(3) conspiracy claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; and (6) the MDC Plaintiffs have not plausibly alleged any claims against Zenk. We affirm the dismissal of the claims brought by the Passaic Plaintiffs.

The Clerk of the Court is directed to enter an order consistent with these conclusions, AFFIRMING in part and REVERSING in part, and REMANDING the matter to the district court for further proceedings consistent with this opinion.

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RAGGI, Circuit Judge, concurring in part in judgment and dissenting in part:

Today, our court becomes the first to hold that a *Bivens* action can be maintained against the nation's two

highest ranking law enforcement officials—the Attorney General of the United States and the Director of the Federal Bureau of Investigation ("FBI")—for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001 ("9/11").[1] I respectfully dissent from this extension of *Bivens* to a context not previously recognized by Supreme Court or Second Circuit precedent. I do not suggest that executive action in this, or any other, context is not subject to constitutional constraints. I conclude only that when, as here, claims challenge official executive policy (rather than errant conduct by a rogue official—the typical *Bivens* scenario), and particularly a national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country, Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages.

Even if a *Bivens* action were properly recognized in this context—which I submit it is not—I would still dissent insofar as the majority denies qualified immunity to five former federal officials, Attorney General John Ashcroft, FBI Director Robert Mueller, Immigration and Naturalization Service ("INS") Commissioner James Ziglar ("DOJ Defendants"), Metropolitan Detention Center ("MDC") Warden Dennis Hasty, and Associate War-

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[1] To date, four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks. See *Vance* v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Mirmehdi* v. *United States*, 689 F.3d 975 (9th Cir. 2012); *Doe* v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); see also *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009).

den James Sherman ("MDC Defendants"), on plaintiffs' policy-challenging claims of punitive and discriminatory confinement and unreasonable strip searches. The majority does narrow these claims by allowing their pursuit only (1) by those aliens confined in the MDC's most restrictive housing unit, the "ADMAX SHU" ("MDC Plaintiffs"); and (2) for restrictive confinement after defendants purportedly learned that plaintiffs were being detained without individualized suspicion of their connection to terrorism. See Majority Op., *ante* at 41-42, 77. Even with the claims so narrowed, however, I think defendants are entitled to qualified immunity because plaintiffs fail to plead plausible policy-challenging claims that were clearly established at law in the period September 2001 to April 2002, when one or more MDC Plaintiffs were confined in the ADMAX SHU. As the majority acknowledges, the 9/11 attacks killed 3,000 people and presented "unrivaled challenges and severe exigencies" for the security of the nation. Majority Op., *ante* at 31. The law did not then clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted for recruitment by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not sure that conclusion is clearly established even now.

Accordingly, because I conclude both that a *Bivens* remedy should not be extended to plaintiffs' policy-challenging claims and that the DOJ and MDC defendants are entitled, in any event, to qualified immunity, I

dissent from the majority's refusal to dismiss these claims.[2]

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[2] In concluding its opinion, the majority asserts that plaintiffs' claims cannot be dismissed because "[i]f there is one guiding principle to our nation it is the rule of law." Majority Op., *ante* at 106. The rule of law, however, is embodied not only in amendments to the Constitution, but also, and first, in that document's foundational structure of separated powers. See 1 Annals of Cong. 581 (1789) (reporting Madison's statement in first Congress that "if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers"); see also Mass. Const. of 1780, Part the First, art. XXX (John Adams) (separating powers "to the end it may be a government of laws, and not of men"); *Boumediene* v. *Bush*, 478 U.S. 714, 721-22 (1986) (observing that "declared purpose of separating . . . powers of government, of course, was to 'diffus[e] power the better to secure liberty,'" (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))). Thus, it is the rule of law that demands that a court do more than identify a possible wrong; it must consider what authority the judiciary has to imply a remedy—specifically, a damages remedy—in the absence of legislative action. See *The Federalist No. 47*, at 251-52 (James Madison) (Carey & McClellan, ed. 2001) (quoting Montesquieu's maxim that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator"); *INS* v. *Chadha*, 462 U.S. 919, 951 (1983) (stating that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 Colum. L. Rev. 1687, 1707 (2004) (observing that "threshold question" for judge is not, "How should I resolve this case?" but "To whom does the Constitution entrust the resolution of this issue?").

It is also the rule of law—to which both sides in a lawsuit have a right—that requires a court to consider whether certain defenses, such as qualified immunity, shield a particular defendant in any event from a suit for damages. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 231-32 (2009) (reiterating that qualified immunity should be decided at earliest possible stage of litigation because it is immunity from suit, not just liability).

## I. *Bivens* Should Not Be Extended To Plaintiffs' Policy-Challenging Claims

### A. The Narrow Scope of *Bivens* Actions

On three occasions in the decade between 1971 and 1980, the Supreme Court implied directly from the Constitution private damages actions against federal officials for alleged violations of rights. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (implying action for unlawful arrest and excessive force in arrest from Fourth Amendment prohibition of unreasonable searches and seizures); accord *Carlson* v. *Green*, 446 U.S. 14 (1980) (implying action for deliberate indifference to prisoner's medical needs from Eighth Amendment prohibition of cruel and unusual punishment); *Davis* v. *Passman*, 442 U.S. 228 (1979) (implying action for sex discrimination in federal employment from equal protection component of Fifth Amendment). The Court has never done so again. Instead, it has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001), emphasizing that "implied causes of actions are disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), and "in most instances . . . unjustified," *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007).

This reluctance to extend *Bivens* is grounded in our constitutional structure of separated powers. As the Supreme Court has explained, deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy" sought, but on "who should decide whether such a

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Thus, the rule of law animates this dissent no less than the majority opinion.

remedy should be provided," specifically, the legislative branch of government, Congress, or the adjudicative branch, the judiciary. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983). For more than thirty years now, the Supreme Court has invariably answered that question in favor of Congress. See, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. at 562 ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act in the public's behalf." (quoting *Bush* v. *Lucas*, 462 U.S. at 389)).

Heeding this precedent, our own court, en banc, has stated "that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Most particularly, it should not be applied in a new context if any alternative process is available to address the claimed constitutional interest or if "special factors" counsel hesitation in recognizing a new damages action. *Bush* v. *Lucas*, 462 U.S. at 378; accord *Minneci* v. *Pollard*, 132 S. Ct. 617, 621 (2012); *Wilkie* v. *Robbins*, 551 U.S. at 550; *Arar* v. *Ashcroft*, 585 F.3d at 572 (collecting cases). In short, a *Bivens* remedy is never "an automatic entitlement"; it "has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie* v. *Robbins*, 551 U.S. at 550.

Applying these principles here, I conclude that plaintiffs' constitutional challenges to an alleged executive policy for confining lawfully arrested illegal aliens in the aftermath of the 9/11 attacks cannot pass the stringent test for recognizing a *Bivens* action. In holding otherwise, the panel majority maintains that plaintiffs' challenges to the conditions of their confinement—with the exception of their Free Exercise challenge—"stand[ ] firmly within

a familiar *Bivens* context," thus avoiding the need to consider factors counseling hesitation or alternative remedies. Majority Op., *ante* at 31-32, 35-36.[3] The majority can reach that conclusion, however, only by fashioning a new standard for construing the few recognized *Bivens* contexts that employs an impermissibly "high level of generality." *Wilkie* v. *Robbins*, 551 U.S. at 561 (cautioning against such construction); accord *Arar* v. *Ashcroft*, 585 F.3d at 572. I respectfully disagree with that analysis.[4]

### B. Plaintiffs' Claims Do Not Arise in an Established *Bivens* Context

#### 1. *The* Arar *v.* Ashcroft *Standard for Identifying* Bivens *Context Is Holistic and Cannot Be Reduced to Two Factors*

In deciding whether a claim arises in a previously recognized *Bivens* context, this panel is bound by our court's en banc decision in *Arar* v. *Ashcroft*, which defines "context" as "a potentially recurring scenario that has similar

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[3] I concur in the panel judgment dismissing plaintiffs' Free Exercise challenge. See Majority Op., *ante* at 35-36. Not only has the Supreme Court consistently declined to extend a *Bivens* remedy to a First Amendment claim in *any* context, see, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), but also Congress has provided alternative relief under the Religious Freedom Restoration Act, see 42 U.S.C. § 2000bb *et seq.*

[4] I dissent from the majority's allowance of *Bivens* claims against *both* the DOJ and the MDC Defendants even though the former group, having secured dismissal on other grounds in the district court, did not renew their *Bivens* challenge in defending that judgment on appeal. No matter. We can affirm on any ground supported by the record, see *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014), and the lists-merger theory on which the majority reverses dismissal was never advanced by plaintiffs' in either the district court or on appeal, see *infra* at 43 n.28.

legal and factual components." 585 F.3d at 572. The majority pays lip service to this definition, see Majority Op., *ante* at 29, but then significantly narrows it to demand commonality only as to the "rights injured" and the "mechanism of injury," *id.* at 32. This substitution cannot be reconciled with controlling precedent.

*Arar*'s definition of context is unqualified, contemplating a careful, holistic examination of all legal and factual components of the "scenario" in which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context. *Arar* v. *Ashcroft*, 585 F.3d at 572. Such an inquiry does not denominate any particular factors—such as the "rights injured" or "mechanism of injury"—as determinative. Nor does it pronounce other factors—such as a challenge to an executive policy, implicating the exercise of national security and immigration authority in a time of crisis—irrelevant.[5] By doing both here, the majority not only fails to conduct the full inquiry mandated by *Arar*'s definition of context. It also fails to heed the Supreme Court admonition that animates the *Arar* definition, *i.e.*, that a *Bivens* remedy—generally "disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. at 675, and usually "unjustified," *Wilkie* v. *Robbins*, 551 U.S. at 550—is never "an automatic entitlement" but, rather, the product of a considered "judgment about the best way to implement a constitutional guarantee" in particular circumstances, *id.* Such a judgment necessarily requires

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[5] In pronouncing the national security challenges following the 9/11 attacks irrelevant to a *Bivens* context determination, the majority cites *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd in part sub nom. *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). See Majority Op., *ante* at 31. That reliance is misplaced because it conflates the question of clearly established *rights*—the qualified immunity concern at issue in *Iqbal* v. *Hasty*, 490 F.3d at 159—with the distinct *Bivens* question of previously established context.

more than the general identification of a constitutional right or a mechanism of injury. It demands consideration of all factors counseling for and against an implied damages action in the specific legal and factual circumstances presented.

It is precisely because a *Bivens* judgment is made only after weighing all factors relevant to a given scenario that, when another case arises presenting similar legal and factual components, a court need not repeat the process. But where a proposed *Bivens* claim presents legal and factual circumstances that were not present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite "judgment" that a judicially implied damages remedy is "the best way" to implement constitutional guarantees in that context. *Wilkie* v. *Robbins*, 551 U.S. at 550.

That is the concern here. No court has ever made the judgment that an implied damages remedy is the best way to implement constitutional guarantees of substantive due process, equal protection, and reasonable search when lawfully arrested illegal aliens challenge an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority. In the absence of a judgment made in *that* context, the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases. Indeed, because rights and mechanisms of injury can arise in a variety of circumstances, presenting different legal and factual components, these two factors cannot alone identify context except at an impermissibly high level of generality. See *Wilkie* v. *Robbins*, 551 U.S. at 561; *Arar* v. *Ashcroft*, 585 F.3d at 572.

This generality con[illegible]n is only exacerbated by the majority's apparent willingness to mix and match a "right" from one *Bivens* case with a "mechanism of injury" from another and to conclude that wherever such a right and such a mechanism of injury are paired together, the resulting *Bivens* claim arises in an established context. See Majority Op., *ante* at 31-35; 37. The problem is that no court has previously made the requisite judgment with respect to that pairing, much less made it in a legal and factual scenario similar to the one presented here.

2. *The Majority Cites No Case Affording a* Bivens *Remedy in a Scenario Legally and Factually Similar to that Presented Here*

a. *Punitive Confinement Claim*

The majority cites two cases, *Carlson* v. *Green*, 446 U.S. 14, and *Thomas* v. *Ashcroft*, 470 F.3d 491 (2d Cir. 2006), in which federal prisoners were allowed to maintain *Bivens* actions for injuries sustained in confinement. See Majority Op., *ante* at 32-33. But in each case, the claim asserted was deliberate indifference to the prisoner's particular medical needs. That scenario is neither legally nor factually similar to a substantive due process claim of punitive pre-trial confinement implied from allegedly purposeless restrictions. See generally *Bell* v. *Wolfish*, 441 U.S. 520 (1970).[6] Indeed, the difference in context is only highlighted by law affording prison authorities considerable discretion in establishing confinement policies. See generally *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517 (2012).

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[6] When, in *Bell* v. *Wolfish*, the Supreme Court discussed the substantive due process prohibition on punitive pre-trial confinement, it did so on a petition for a writ of habeas corpus, not in a *Bivens* action. See 441 U.S. at 526, 528.

Deliberate indifference to an individual inmate's particular health needs was also the basis for the constitutional claim in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61. In that case, however, the Supreme Court declined to extend a *Bivens* remedy to such a claim when brought against a private corporation operating detention facilities under a contract with the Bureau of Prisons ("BOP"). See *id.* at 74. Thus, the *Malesko* observation cited by the majority—that "[i]f a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officers, subject to the defense of qualified immunity," Majority Op., *ante* at 33 (quoting *Malesko*, 534 U.S. at 72)—cannot be read apart from the context in which it was made. It would, in fact, be extraordinary to conclude that in a deliberate indifference case such as *Malesko*, in which all claims against individuals had been dismissed, and in which the Supreme Court declined to extend *Bivens* to the private corporate defendant, the Court was, nevertheless, using a single sentence of *dictum* to sweep well beyond *Carlson* and to hold that *Bivens* remedies are available to federal prisoners raising any constitutional challenge to any aspect of their confinement against individual federal employees. Indeed, that reading is foreclosed in this circuit by *Arar*, which observed that *Carlson* extended *Bivens* to Eighth Amendment violations by prison officials, after which "the Supreme Court has declined to extend the *Bivens* remedy in any new direction *at all*." *Arar* v. *Ashcroft*, 585 F.3d at 571 (emphasis added).

In *Tellier* v. *Fields*, also cited by the majority, *ante* at 34, a prison inmate did seek a *Bivens* remedy for restrictive confinement, but the right he asserted was *procedural* not *substantive* due process. See 280 F.3d 69, 73

(2d Cir. 2001). In short, he complained that defendants had failed to follow controlling procedures for imposing prison discipline. He did not contend that the restrictive conditions themselves were substantively unreasonable, a claim with quite different legal and factual components.[7]

In sum, the panel majority points to no case in which the Supreme Court or this court has yet extended a *Bivens* remedy to claims of punitive confinement by federal pre-trial detainees, and certainly not in the unprecedented context of a challenge to executive policy implicating the exercise of national security and immigration authority in a time of crisis.[8]

b. *Discriminatory Confinement Claim*

Nor does the majority cite to any case affording a *Bivens* remedy for alleged discriminatory conditions of

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[7] This court has already dismissed procedural due process challenges to the confinement policy here at issue on grounds of qualified immunity. See *Iqbal* v. *Hasty*, 490 F.3d at 167-68.

[8] The majority cites two cases—not controlling on this court—that allowed federal detainees to pursue a *Bivens* remedy for restrictive confinement. See *Bistrian* v. *Levi*, 696 F.3d 352, 374-75 (3d Cir. 2012); *Cale* v. *Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), abrogated on other grounds by *Thaddeus-X* v. *Blatter*, 175 F.3d 378 (6th Cir. 1999 (en banc). In neither case, however, did these courts assess "context" by reference to the standard we articulated in *Arar*. In fact, *Bistrian* conducted no *Bivens* extension analysis. Much less were these other circuit courts confronted with the circumstances contributing to the unique scenario presented here.

Insofar as the majority cites the *dissenting* opinion in *Arar* for the proposition that this court has "presumed the availability of a *Bivens* remedy for substantive due process claims," Majority Op., *ante* at 32 n.15 (citing *Arar*, 585 F.3d at 598 (Sack, J., dissenting)), it is, of course, not the dissent, but the en banc majority opinion in *Arar* that controls our context consideration here. For reasons already discussed, that controlling opinion requires us to look to more than the right alleged to identify an established *Bivens* context.

confinement. The context of the single equal protection case cited, *Davis* v. *Passman*, 442 U.S. 228, was employment discrimination by a member of Congress. See Majority Op., *ante* at 32 n.15. That scenario bears almost no factual and legal similarity to the equal protection claim here, which is informed not only by the discretion afforded prison authorities in establishing confinement policies, see generally *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1517, but also by the particular circumstances of the 9/11 attacks, see generally *Ashcroft* v. *Iqbal*, 556 U.S. at 682 (observing that because 9/11 attacks were ordered and conducted by Arab Muslims, it was "no surprise" that legitimate law enforcement policies to identify 9/11 assailants and to prevent future attacks "would produce a disparate incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims").

Even in the context of employment discrimination claims, the Supreme Court has been reluctant to construe *Davis* v. *Passman* to reach beyond its particular factual scenario, especially where factors—not present in *Davis*—counsel hesitation. See *Chappell* v. *Wallace*, 462 U.S. 296, 297-305 (1979) (declining to extend *Bivens* to enlisted soldiers' claims of race discrimination against commanding officers). If, as the majority seems to recognize, *Davis* cannot be construed to afford a *Bivens* remedy for every claim of *employment* discrimination, see Majority Op., *ante* at 32 n.15, it can hardly be understood to afford a *Bivens* remedy in the altogether different context of alleged prison confinement discrimination.

c. *Strip-Search Claim*

In challenging the strip-search component of their restrictive confinement, the MDC Plaintiffs invoke the Fourth as well as the Fifth Amendment. The Fourth

Amendment cases cited by the majority—*Bivens*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004), and *Castro* v. *United States*, 34 F.3d 106 (2d Cir. 2006), see Majority Op., *ante* at 36-37—do not present scenarios similar to that here.

The potentially recurring scenario in *Bivens* was unlawful arrest, executed without probable cause and with excessive force. See 403 U.S. at 389. That hardly represents a judgment that an implied *Bivens* damages action is the best way to vindicate *every* Fourth Amendment claim. See Majority Op., *ante* at 37. Rather, to come within the context established by *Bivens*, a Fourth Amendment claim must have legal and factual components akin to unlawful arrest. See generally *Arar* v. *Ashcroft*, 585 F.3d at 572. Plaintiffs here do not challenge their arrests, which were all supported by probable cause to believe that each detained alien had violated immigration laws, and which were all effected without undue force. Instead, plaintiffs challenge a policy of restrictive confinement (including strip searches) *after* lawful arrest.

As for *Groh* and *Castro*, the searches there at issue were of private residences, a factually distinct scenario presenting different legally cognizable expectations of privacy giving rise to different legal standards of constitutional reasonableness than those applicable to prison searches. See *Covino* v. *Patrissi*, 967 F.2d 73, 75 (2d Cir. 1992) (observing, in § 1983 action, that constitutionality of pre-trial detainee strip searches should be assessed under "legitimate penological interests" standard outlined in *Turner* v. *Safley*, 482 U.S. 78, 87 (1987)); accord *Iqbal* v. *Hasty*, 490 F.3d at 172.

To summarize, I respectfully dissent from the majority's conclusion that plaintiffs' policy-challenging claims to restrictive confinement arise in a familiar *Bivens* context because (1) to the extent the majority employs a

rights-injury calculus to reach that conclusion, it construes context at an impermissibly high level of generality; and (2) no case cited by the plaintiffs or the majority has yet made the requisite judgment that a *Bivens* remedy is the best way to implement constitutional rights in a scenario with legal *and* factual components similar to those presented here. In short, the context here is "fundamentally different from anything recognized in *Bivens* or subsequent cases." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. at 70. Thus, this court must conduct the full analysis necessary to extend a *Bivens* remedy to a new context. Because the majority declines to do so, see Majority Op., *ante* at 38 n.17, I undertake that task here.

### C. Factors Counseling Against Extending *Bivens* to Plaintiffs' Policy-Challenging Claims

Not only do the unique circumstances of this case not fall within an established *Bivens* context, but a number of those circumstances also counsel hesitation in extending a *Bivens* remedy here. See *Bush* v. *Lucas*, 462 U.S. at 378 (instructing courts to pay "particular heed" to "any special factors counseling hesitation before authorizing a new kind of federal litigation"); accord *Minneci* v. *Pollard*, 132 S. Ct. at 621; *Wilkie* v. *Robbins*, 551 U.S. at 550; *Arar* v. *Ashcroft*, 585 F.3d at 573 (characterizing "special factors" as "embracing category," which includes any circumstance provoking hesitation about propriety of court entertaining damages claim in absence of congressional action). I discuss four factors in particular, the first three of which are inextricably intertwined: (1) plaintiffs challenge an official executive policy (rather than rogue action), implicating (2) the executive's immigration authority, (3) as well as its national security authority, and

(4) Congress has afforded no damages remedy to 9/11 detainees despite awareness of the concerns raised here.

1. *Official Executive Policy*

Plaintiffs challenge what they themselves characterize as an official confinement policy propounded by the nation's two highest ranking law enforcement officials, the Attorney General and the FBI Director, in response to the national security threat raised by the terrorist attacks of 9/11. Neither plaintiffs nor the panel majority identifies any case affording a *Bivens* remedy in the context of a constitutional challenge to executive branch policy, and certainly not to policy made at the cabinet level. This is not surprising. A *Bivens* action has never been considered a "proper vehicle for altering an entity's policy." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. at 74. While *Malesko* made this observation in declining to extend *Bivens* to a suit against a corporate defendant, this court has recognized en banc that it applies with equal force to claims against individuals. As we explained in *Arar* v. *Ashcroft*, allowing a private party to maintain a *Bivens* action against federal officials for "policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees . . . is without precedent and implicates questions of separation of powers as well as sovereign immunity." 585 F.3d at 578.

That admonition counsels particular hesitation here where the challenged confinement policy was purportedly propounded and maintained not by rogue actors, see *Kreines* v. *United States*, 33 F.3d 1105, 1108 (9th Cir. 1994) (stating that *Bivens* actions are generally brought "against rogue officers who step outside the scope of their official duties"), but by persons specifically charged by the President with primary responsibility for home-

land defense after 9/11.[9] In this regard, it is worth recalling that the confinement policy here at issue was not the only action taken by the nation in response to the security exigencies presented by the 9/11 attacks. Within a week, the United States went to war.[10] Defendants Ashcroft and Mueller were among those senior officials who served as the President's "war council," and it was in that context that they were charged with homeland defense.[11] These circumstances should only add to our hesitation in judicially implying a *damages* remedy against executive officials who might well be understood to have been acting as "the hand of the president" in formulating policies responding to a national emergency.[12]

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[9] See *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States* ("9/11 Report") 333 (2004), available at http://1.usa.gov/1AMXOO4 (detailing President's written assignment of responsibility for homeland security after 9/11 to Attorney General Ashcroft, FBI Director Mueller, and CIA Director George Tenet); see also Jack Goldsmith, *The Terror Presidency* 75 (2007) (recounting that, at September 12, 2001 meeting of National Security Council, President Bush told Attorney General Ashcroft, "'Don't ever let this happen again,'" a "simple sentence" that "set the tone for everything Ashcroft's Justice Department would do in the aftermath of 9/11").

[10] See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

[11] See 9/11 Report 330 (identifying Attorney General and FBI Director, along with Vice President, Secretaries of State and Defense, Chairman and Vice-Chairman of Joint Chiefs, National Security Advisor, CIA Director, and President's Chief of Staff, as "top advisers" convened by President on night of 9/11 and subsequently denominated by him as his "war council" in responding to terrorist attacks).

[12] In *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922), Chief Justice (and former President) Taft described the Attorney General as "the hand of the president" in protecting United States interests in legal proceedings.

Nor is a different conclusion warranted here because subordinates of the Attorney General may have disagreed among themselves about the parameters of the challenged policy. See Majority Op., *ante* at 49.[13] As this court has recognized, a *Bivens* damages action is not the appropriate vehicle for reopening executive branch debates so that the judiciary can second-guess the final policy decision. See *Benzman* v. *Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) (observing that "right of federal agencies to make discretionary decisions when engaged in disaster relief without the fear of judicial second-guessing" raises separation-of-powers concern cautioning hesitation in extending *Bivens* (internal quotation marks omitted)). The Fourth Circuit reached that same conclusion in declining to extend *Bivens* to a due process challenge to the executive's designation of enemy combatants in the war on terrorism, a matter on which the FBI and Defense Department had allegedly disagreed. See *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). In so ruling, *Lebron* observed that the claims not only intruded on "past executive deliberations affecting sensitive matters

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[13] The majority locates evidence of disagreement between the FBI and INS with respect to the MDC Plaintiffs' continued restrictive confinement in the ADMAX SHU in an OIG Report's account of a November 2, 2001 meeting. See Dep't of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* ("OIG Report") 55-56 (April 2003), available at http://1.usa.gov/1ygkjKg. This is misleading. As I explain *infra* at 52-53, the OIG Report makes plain that the disagreement voiced by FBI and INS representatives at that meeting pertained *not* to whether illegal aliens detained at the MDC should continue to be held in the ADMAX SHU, but to whether New York list detainees (housed both restrictively at the MDC and in general population at the Passaic County Jail) should continue to be held at all.

of national security," but also risked chilling frank, future policy discussions in this area "shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability." *Id.* at 551.

As earlier stated, hesitation in extending *Bivens* does not suggest that federal policymakers—even those appointed by the President and of cabinet rank—are not bound by constitutional constraints. See *supra* at 1-2. It simply recognizes that where an executive policy is at issue, Congress, not the judiciary, is the branch best suited to decide whether a damages action is the appropriate vehicle for challenging that policy. See *Arar* v. *Ashcroft*, 585 F.3d at 574 (explaining that "federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a [judicially created] private action for money damages against individual policymakers is not one of them"); see also *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (observing that "normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author").

2. *Implicating Executive's Immigration Authority*

Further removing plaintiffs' claims from any recognized *Bivens* context, and certainly counseling hesitation in extending a *Bivens* remedy, is the fact that the challenged policy implicates the executive's immigration authority. As the Supreme Court has stated—in general and not simply with respect to *Bivens*—"any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a re-

publican form of government," matters "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" absent congressional authorization. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952); accord *Arar* v. *Ashcroft*, 585 F.3d at 570.

The majority, however, concludes that plaintiffs' immigration status is irrelevant to assessing a *Bivens* context because illegal aliens have the same rights as citizens to be free from punitive or discriminatory conditions of confinement. See Majority Op., *ante* at 35. Whatever the merits of that conclusion generally, it begs the relevant *Bivens* extension question, which is not whether the Constitution affords illegal aliens certain rights coextensive with those of citizens, but whether a judicially implied damages remedy is the best way to implement such rights when the plaintiff is an illegal alien and not a citizen. See *Wilkie* v. *Robbins*, 551 U.S. at 550; *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2012) (observing that "immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those afforded to citizens," and declining to extend *Bivens* to illegal alien's claim of wrongful detention pending deportation).

Even assuming that in the familiar *Bivens* contexts of false arrest or deliberate indifference, the law were to conclude that the distinction between citizens and aliens did not counsel hesitation in extending a *Bivens* remedy, that is not this case. Plaintiffs here seek to employ a *Bivens* action to challenge an executive policy for the restrictive confinement of lawfully arrested illegal aliens while the FBI and CIA determined if they had any connection to recent terrorist attacks by aliens operating in this country or if they posed a threat of future attacks.

This is hardly a familiar *Bivens* context, and such an intrusion on the executive's immigration authority counsels hesitation in denominating a judicially implied damages remedy against policymakers as the "best way" to implement constitutional guarantees in those circumstances. *Wilkie* v. *Robbins*, 551 U.S. at 550.

3. *Implicating Executive's National Security Authority*

Plaintiffs' claims also propose to inquire into—and dispute—the executive's exercise of its national security authority. Indeed, that seems to be their primary purpose. This is an unprecedented *Bivens* context strongly counseling hesitation.

To explain, plaintiffs' due process and equal protection claims require proof of defendants' specific intent, either to punish, see *Bell* v. *Wolfish*, 441 U.S. at 538, or to discriminate, see *Washington* v. *Davis*, 426 U.S. 229, 241-42 (1976). Such intent may be either express or implied. See *Brown* v. *City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). The majority here concludes that plaintiffs plausibly *imply* proscribed intent through allegations that the challenged confinement policy was "not reasonably related to a legitimate goal." See Majority Op., *ante* at 55-58 (citing *Bell* v. *Wolfish*, 441 U.S. at 539). It similarly concludes that plaintiffs' plausibly plead that frequent strip searches were unreasonable relative to any legitimate penological interest. See *id.* at 97.

The "legitimate goal" at issue here is national security. MDC Plaintiffs propose to prove that their confinement in the ADMAX SHU was punitive and/or discriminatory by showing that there was no real national security need to maintain them in such restrictive confinement pending FBI-CIA clearance, at least not in the absence of prior individualized suspicion that each alien posed a terrorism

threat. Plaintiffs propose to make essentially the same showing in challenging the reasonableness of the strip-search policy that accompanied restrictive confinement. Thus, the executive's exercise of national security authority, far from being irrelevant to plaintiffs' *Bivens* claims, see Majority Op., *ante* at 31, will be *the* critical focus of this litigation—and of the exhaustive discovery that will undoubtedly attend it.

The Supreme Court has never afforded a *Bivens* remedy to a party challenging the executive's exercise of its national security authority. See *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) (making observation in declining to recognize *Bivens* action). Indeed, the Court has observed—in general and not simply with respect to *Bivens*—that "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention" in the absence of congressional authorization. *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); see *Department of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988) (stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); accord *Arar* v. *Ashcroft*, 585 F.3d at 578 (noting that intrusion on executive's national security authority raises "grave concerns about the separation of powers" dictated by the Constitution and, thus, counsels hesitation in extending *Bivens*).

Further counseling hesitation is the judiciary's limited competency to make national security assessments, see *Arar* v. *Ashcroft*, 585 F.3d at 575-78, particularly ones that could be informed by classified information, see generally *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2009) (observing that federal judges do not "begin the day with briefings that may describe new and serious threats to

our Nation and its people").[14] That competency concern is only heightened here by the extensive inquiry that will be necessary to understand and assess the risk concerns reasonably informing the challenged restrictive confinement policy. At a minimum, such an inquiry would have to consider the 9/11 attacks, the al Qaeda terrorist organization that ordered them, the attacks' alien perpetrators, and how those aliens—and, therefore, similarly minded others—could operate in the United States without detection.[15] It would have to consider the history of al Qaeda attacks on American interests *prior* to 9/11,[16] as well as terrorists' frequent use of immigration fraud to conceal their murderous plans.[17] It would have to consid-

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[14] See also Goldsmith, *The Terror Presidency* 71-74 (describing "threat matrix" provided daily to President and select officials, including Attorney General and FBI Director).

[15] See, *e.g.*, 9/11 Report 227-29 (reporting how, when 9/11 hijackers Mohamed Atta and Marwan al Shehhi encountered difficulty reentering United States in January 2001 without presenting student visas, they nevertheless persuaded INS inspectors to admit them so that they could continue flight training).

[16] Previous al Qaeda attacks included (1) the 1993 World Trade Center bombing (six deaths); (2) the thwarted 1993 conspiracy to bomb New York City landmarks led by the "Blind Sheikh," Omar Abdel Rahman; (3) the thwarted 1995 plot to explode American commercial airplanes over the Pacific Ocean, led by Ramzi Yousef; (4) the 1996 bombing of an apartment complex housing United States Air Force personnel in Khobar, Saudi Arabia (19 deaths); (5) the 1998 bombings of United States embassies in Tanzania and Kenya (224 deaths); (6) the thwarted millennial bombing of Los Angeles International Airport; and (7) the 2000 bombing of the U.S.S. Cole (17 deaths). See *United States* v. *Farhane*, 634 F.3d 127, 132 n.4 (2d Cir. 2011); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 103-05 (2d Cir. 1998).

[17] See, *e.g.*, 9/11 Report 177-78 (discussing how conspirators in Los Angeles Airport plot followed "a familiar terrorist pattern" of using

er past life-threatening actions by Islamic terrorists while in federal custody.[18] It would have to consider events *after* 9/11—during the time when the challenged confinement policy was maintained—that fueled fears of further attacks.[19]

Hesitation is also counseled by sober recognition that national security assessments, "particularly in times of conflict, do not admit easy answers, especially not as products of the necessarily limited analysis undertaken in a single case." *Lebron* v. *Rumsfeld*, 670 F.3d at 549. This contrasts sharply with "the small number of contexts in which courts have implied a *Bivens* remedy," where it generally has "been easy to identify both the line between constitutional and unconstitutional conduct, and

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"fraudulent passports and immigration fraud to travel" in furtherance of their scheme).

[18] See, *e.g.*, *infra* at 67-68 (discussing prison actions of Omar Abdel Rahman and Mamdouh Mahmud Salim).

[19] Among these events were (1) the September 18, 2001 transmittal of anthrax in letters sent to various government and media offices, killing five, and infecting 17; (2) the mysterious November 12, 2001 crash of an American Airlines plane soon after takeoff from John F. Kennedy Airport, killing all onboard; (3) the thwarted December 22, 2001 attempt by Richard Reid to detonate a shoe bomb onboard an American Airlines plane traveling from Paris to Miami; and (4) the January 2002 kidnapping, and February 2002 beheading of *Wall Street Journal* reporter Daniel Pearl in Pakistan. Subsequent investigation would link the last two events to al Qaeda, with 9/11 mastermind Khalid Sheikh Mohammed claiming particular credit for the Pearl murder. See Peter Finn, *Khalid Sheik Mohammed killed U.S. Journalist Daniel Pearl, report finds*, Wash. Post, Jan. 20, 2011, http://wapo.st/NyvICX; Pam Belluck, *Threats and Responses: The Bomb Plot; Unrepentant Shoe Bomber Is Given a Life Sentence For Trying to Blow Up Jet*, N.Y. Times, Jan. 31, 2003, http://nyti.ms/ZhFZJF.

the alternative course which officers should have pursued." *Arar* v. *Ashcroft*, 585 F.3d at 580.

Here, the majority proposes to draw a line between *generally* and *restrictively* confining illegal aliens until they are cleared of terrorist connections. It concludes that general confinement raises no constitutional concerns—even though the aliens so confined were mostly Arab and Muslim. But it concludes that restrictive confinement of such aliens (at least in the absence of individualized suspicion) goes too far reasonably to relate to national security. See Majority Op., *ante* at 40-41. Setting aside the question of judicial competency to make this national security assessment, the Supreme Court has specifically cautioned against extending *Bivens* to claims that propose to show that government officials "went too far" in pursuit of a legitimate objective. *Wilkie* v. *Robbins*, 551 U.S. at 556-57. That caution is particularly apt here where, before 9/11, the executive had never had to consider whether, and how restrictively, to confine illegal aliens in the aftermath of a surprise terrorist attack by aliens operating within this country. Much less had the courts ever confronted these questions. Precedent provided no easy answer—and certainly no easy negative answer—to whether it "reasonably related" to national security to hold lawfully arrested illegal aliens in restrictive confinement, at least until the FBI and CIA cleared them of terrorist connections. The law does not, after all, invariably demand individualized suspicion to support the restrictive confinement of lawfully arrested persons to ensure security, a point I discuss further *infra* at 62-63, and with which the majority agrees. See *Bell* v. *Wolfish*, 441 U.S. at 560-62; accord *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1523; *Whitley* v. *Albers*, 475

U.S. 312, 316 (1986); *Block* v. *Rutherford*, 468 U.S. 576, 577 (1984); see also Majority Op., *ante* at 58 n.31.

Where plaintiffs' policy-challenging claims thus turn on a "reasonably related" inquiry implicating national security decisions made within "a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached," we not only confront a new *Bivens* context, but also one strongly counseling hesitation. *Arar* v. *Ashcroft*, 585 F.3d at 575, 580 (declining to extend *Bivens* to claim requiring "inquiry into the perceived need for the [challenged] policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats").

Again, this does not mean that executive detention and confinement decisions implicating national security are insulated from judicial review. The Constitution's guarantee of habeas corpus ensures against that. See *Boumediene* v. *Bush*, 553 U.S. at 771; *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 525, 533 (2004); see also *Bell* v. *Wolfish*, 441 U.S. at 526. But the fact that the Constitution expressly affords a liberty-safeguarding remedy against the sovereign even when national security concerns are present is hardly an invitation to the judiciary to imply a damages remedy against individual executive officials in these circumstances. See *Lebron* v. *Rumsfeld*, 670 F.3d at 550 (drawing distinction). Such a decision is more properly made by the legislative rather than the adjudicative branch of government.[20]

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[20] Were Congress to afford compensatory relief in the circumstances at issue, it is hardly obvious that it would place the burden on indi-

Thus, where, as here, plaintiffs urge this court to imply a damages action where none has been provided by Congress so that persons unlawfully in this country can challenge executive policy relating to national security in a time of crisis, a proper regard for separation of powers counsels hesitation in judicially extending *Bivens* to that new context. Indeed, I would decline to extend *Bivens* to plaintiffs' policy-challenging claims for this reason alone. There is, however, yet one further factor counseling hesitation.

4. *Congress's Failure to Provide a Damages Remedy*

The judiciary will not imply a *Bivens* action where Congress itself "has provided what it considers adequate remedial mechanisms for constitutional violations." *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988). Even where a congressionally prescribed remedy is lacking, however, courts will hesitate to extend *Bivens* to a new context where there is reason to think Congress's inaction is not "inadvertent." *Id.*; accord *Dotson* v. *Griesa*, 398 F.3d 156, 167 (2d Cir. 2005). That conclusion is warranted here, where Congress has not provided a damages remedy to post-9/11 detainees despite its awareness that (1) DOJ was arresting and detaining illegal aliens as part of its response to 9/11, (2) DOJ might press hard against constitutional bounds in its efforts to safeguard national

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vidual officials rather than the sovereign on whose behalf they acted. See generally John Paul Stevens, *Reflections About the Sovereign's Duty to Compensate Victims Harmed by Constitutional Violations, Lawyers for Civil Justice Membership Meeting* ("Stevens Reflections") 11 (May 4, 2015), available at http://1.usa.gov/1Ih51e4 (proposing that "sovereign, rather than its individual agents," compensate any persons whose rights were violated in course of 9/11 investigation).

security, and (3) concerns had arisen pertaining to the detention of Arab and Muslim aliens.

As to the first point, Attorney General Ashcroft and FBI Director Mueller (as well as other DOJ officials) repeatedly testified before Congress that the arrest of illegal aliens was part of DOJ's post-9/11 strategy against terrorism.[21]

As to the second point, when Congress enacted the PATRIOT Act in October 2001, it anticipated possible DOJ overreaching and required the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism.[22] Indeed, it is pursuant to this legislative mandate that the Inspector General provided Congress with the very OIG Reports upon which plaintiffs rely in pleading their complaint.

As to the third point, these OIG Reports discussed concerns about the treatment of confined Arab and Muslim aliens, and Congress's attention to these concerns is

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[21] See, *e.g.*, *Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 312 (Dec. 6, 2001) (statement of John Ashcroft, Att'y Gen. of the United States) (explaining "deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets," noting that "INS has detained 563 individuals on immigration violations" and that BOP had "acted swiftly to intensify security precautions in connection with al Qaeda and other terrorist inmates," and adding that DOJ "has briefed members of the House, the Senate and their staffs on more than 100 occasions").

[22] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001).

evident in the public record.[23] Despite its awareness of these matters, however, neither in enacting the PATRIOT Act, nor in the more than thirteen years that have now followed—during which time portions of the PATRIOT Act were reauthorized five times[24]—has Congress afforded a damages remedy to aliens who were, or in the future could be, detained in connection with terrorism investigations. We must presume that Congress was aware that alternative, albeit noncompensatory, remedies were available to challenge unconstitutional confinement, notably, habeas corpus and the "remedial mechanisms established by the BOP, including suits in federal court for injunctive relief." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. at 74 (observing that injunctive relief has long been recognized as proper means for altering unconstitutional policy); see *Bell* v. *Wolfish*, 441 U.S. at 526 (habeas corpus review).[25] Where Congress, with

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[23] See, *e.g.*, *Oversight Hearing: Law Enforcement and Terrorism: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 192 (July 23, 2003) (questioning by Sen. Patrick Leahy of FBI Director Mueller about OIG report "alleging, among other things, the abuse of immigrants being held in Federal custody," particularly "Muslim and Arab immigrants being held on civil violations of our immigration laws").

[24] See Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 268 (2015); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011); Act to Extend Expiring Provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until February 28, 2011, Pub. L. No. 111-141, 124 Stat. 37 (2010); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2005).

[25] MDC Plaintiff Baloch was among the illegal aliens arrested in the 9/11 investigation who filed a habeas petition to challenge his con-

awareness of the concerns at issue, as well as the remedies available to address them, legislates repeatedly in an area without affording a damages remedy, there is strong reason to think that its inaction was not inadvertent and, thus, for the judiciary to hesitate before extending *Bivens* to that area. See *Klay* v. *Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014) ("If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under *Bivens*, respect for the separation of powers demands that courts hesitate to imply a remedy."); *Lebron* v. *Rumsfeld*, 670 F.3d at 551-52 (observing that where "Congress was no idle bystander" and had "devoted extensive attention" to the concerns at issue in case but nonetheless did not create damages remedy, court could infer that "congressional inaction ha[d] not been inadvertent"); *cf. Arar* v. *Ashcroft*, 585 F.3d at 573 (stating that "complexity" of remedial immigration scheme created (and frequently amended) by Congress would ordinarily warrant "strong inference that Congress intended the judiciary to stay its hand and refrain from creating a *Bivens* action in this context").

Accordingly, insofar as plaintiffs invoke *Bivens* to challenge an official executive policy for the restrictive

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finement. See *Turkmen* v. *Ashcroft*, No. 02 CV 2307 (JG), 2006 WL 1662663, at *5 (E.D.N.Y. June 14, 2006) ("*Turkmen I*") (stating that Baloch filed habeas petition and six weeks later was transferred from ADMAX SHU to general population), aff'd in part, vacated in part, 589 F.3d 542 (2d Cir. 2009) ("*Turkmen II*"); see also OIG Report 87, 99-100, 102 (reporting other detainees' filing of habeas petitions).

The Ninth Circuit has cited the availability of a habeas remedy (and plaintiffs' pursuit of such relief) as a factor counseling hesitation in extending *Bivens* to claims of unlawful detention. See *Mirmehdi* v. *United States*, 689 F.3d at 982.

confinement and strip searching of illegal aliens in the aftermath of the 9/11 attacks, I conclude that their claims must be dismissed because a *Bivens* remedy has not been extended to such a context, and factors strongly counsel against this court doing so here. If illegal aliens should be afforded a damages remedy to challenge an executive policy implicating immigration and national security authority, that decision should be made by Congress rather than by the courts. See *Arar* v. *Ashcroft*, 585 F.3d at 580-81 ("Congress is the appropriate branch" to decide whether policy decisions "directly related to the security of the population and the foreign affairs of the country" should be "subjected to the influence of litigation brought by aliens").

## II. Defendants Are Entitled to Qualified Immunity

### A. The Concept of Qualified Immunity

Whether or not a *Bivens* action is available to challenge the executive policy at issue, defendants are entitled to dismissal on grounds of qualified immunity. Qualified immunity—a concept derived from common law—shields federal and state officials from claims for money damages "unless a plaintiff pleads facts showing that (1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). For law to be clearly established, it is not necessary to identify a case directly on point. But precedent must have spoken with sufficient clarity to have placed the constitutional question "beyond debate." *Id.* at 2083; accord *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014). Put another way, the law must have made "the contours" of the asserted right "sufficiently clear that

every reasonable official would have understood that what he is doing violates that right." *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2083 (internal quotation marks omitted).

Qualified immunity affords such a broad shield to protect not simply government officials but government itself, specifically, "government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992). Thus, qualified immunity is afforded to ensure both that talented persons are not deterred from entering public service by the threat of crippling damages suits, see *id.*, and that those in government service act "with the decisiveness and the judgment required by the public good," *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974); accord *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1665 (2012); *Richardson* v. *McKnight*, 521 U.S. 399, 409 (1997) (describing "unwarranted timidity" on the part of those engaged in public's business as "most important special government immunity-producing concern"); *Amore* v. *Novarro*, 624 F.3d 522, 530 (2d Cir. 2010) (recognizing that qualified immunity is animated by "concern that for the public benefit, public officials be able to perform their duties unflinchingly and without constant dread of retaliation").

Toward this end, qualified immunity serves to give public officials "breathing room to make reasonable but mistaken judgments" without fear of disabling liability. *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks omitted). Indeed, the standard is sufficiently forgiving that it protects "'all but the plainly incompetent or those who knowingly violate the law.'"

*Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).[26]

It is difficult to imagine a public good more demanding of decisiveness or more tolerant of reasonable, even if mistaken, judgments than the protection of this nation and its people from further terrorist attacks in the immediate aftermath of the horrific events of 9/11.[27] Whatever lessons hindsight might teach about how best to achieve this legitimate government objective within our system of laws, I cannot conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy. Insofar as the majority decides otherwise based on its determinations that plaintiffs have (1) plausibly pleaded violations of Fourth and Fifth Amendment rights, (2) which rights were clearly established at the time of defendants' actions, I respectfully dissent. As to the second point in particular, I think the majority defines established law at an impermissibly "high level of generality." *Id.* at 2084.

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[26] The Supreme Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. See, *e.g.*, *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2044 (2015); *Carroll* v. *Carman*, 135 S. Ct. at 350-52; *Lane* v. *Franks*, 134 S. Ct. 2369, 2383 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2070 (2014); *Plumhoff* v. *Richard*, 134 S. Ct. 2012, 2023-24 (2014); *Stanton* v. *Sims*, 134 S. Ct. 3, 7 (2013).

[27] See generally Stevens Reflections 9 (advocating *absolute* immunity for "dedicated public officials"—including Ashcroft and Mueller—who, in aftermath of 9/11, were "attempting to minimize the risk of another terrorist attack," while proposing that federal government assume responsibility for compensating any persons whose rights were violated).

**B. Punitive Confinement**

The MDC Plaintiffs having been lawfully arrested for, but not yet convicted of, violations of federal immigration law, their confinement status was that of pretrial detainees. The Fifth Amendment guarantee of substantive due process does not permit pre-trial detainees to be subjected to confinement, or to restrictive conditions of confinement, "for the purpose of punishment." *Bell* v. *Wolfish*, 441 U.S. at 538. At the same time, due process does not preclude restrictive confinement "incident of some other legitimate government purpose." *Id.* In short, pre-trial confinement, or a condition of pre-trial confinement is not deemed "punishment" in the abstract, but only by virtue of the purpose for which it is imposed.

To maintain a punitive confinement claim, then, a pre-trial detainee must plausibly plead that a defendant imposed restrictive confinement with the specific intent to punish. See *id.* Where, as here, plaintiffs propose for such intent to be implied, they must plead facts sufficient to admit a plausible inference that the challenged conditions of their confinement were "not reasonably related to a legitimate goal" but, rather, were "arbitrary or purposeless." *Id.* at 539. The burden is significant because a reasonable relatedness inquiry is not an end in itself. Rather, it is a proxy for determining a defendant's true intent. Thus, a plaintiff does not plausibly plead punitive intent simply by alleging *some* mismatch between challenged conditions of confinement and the legitimate goal they are intended to serve. See, *e.g.*, *id.* at 558-60 (rejecting challenge to routine body cavity searches of pre-trial detainees following contact visits even though there had been only one reported attempt to smuggle contraband into facility in body cavity); accord *Block* v. *Rutherford*, 468 U.S. at 587 (rejecting lower courts' characterization

of total ban on contact visits as excessive in relation to security and other interests at stake). The mismatch must be so glaring as to make the challenged condition "arbitrary or purposeless" relative to any legitimate goal. Moreover, when the professed legitimate goal is security, the plausibility of any arbitrary or purposeless assertion must be considered in light of the "wide-ranging deference" that the law accords prison administrators in determining the conditions necessary to preserve discipline and security. *Bell* v. *Wolfish*, 441 U.S. at 547 (cautioning that courts must not depend on their own "idea of how best to operate a detention facility"); accord *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1517; *Trammell* v. *Keane*, 338 F.3d 155, 163 (2d Cir. 2003).

Further, as the Supreme Court recently explained in rejecting an earlier discriminatory confinement challenge to the very policy here at issue, plaintiffs cannot carry their pleading burden by alleging facts that admit only a "possibility" of defendants' proscribed intent. *Ashcroft* v. *Iqbal*, 556 U.S. at 678. "[F]acts that are merely consistent with a defendant's liability . . . stop[ ] short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). This is particularly so where "more likely" legitimate explanations for defendants' actions are "obvious." *Id.* at 681-82.

1. *DOJ Defendants*

The panel majority concludes—and I agree—that plaintiffs fail plausibly to plead that the DOJ hold-until-cleared policy, as applied *ab initio* to illegal aliens arrested in the course of the FBI's 9/11 investigation, implies the DOJ Defendants' punitive intent. The "obvious" and "more likely explanation[ ]" for the policy was the government's legitimate interest in national security, specifically, in identifying and apprehending any persons con-

nected with the 9/11 terrorist attacks and in detecting and preventing future attacks. *Id.* In pursuing those goals, the DOJ Defendants were entitled to assume that subordinates would lawfully implement the hold-until-cleared policy. See Majority Op., *ante* at 40; see also *Turkmen* v. *Ashcroft*, 915 F. Supp. 2d 314, 340 (E.D.N.Y. 2013) ("*Turkmen III*").

Where I depart from the majority is in its determination that plaintiffs plausibly plead that the DOJ Defendants' legitimate national security purpose transformed to proscribed punitive intent by November 2001, when they approved merger of the FBI New York detainee list with the INS national detainee list, thereby maintaining the MDC Plaintiffs in the ADMAX SHU pending FBI-CIA clearance without individualized suspicion of these aliens' connection to terrorism. See Majority Op., *ante* at 40-42. Much less can I agree that clearly established law alerted every reasonable official that such actions violated substantive due process.[28]

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[28] Plaintiffs themselves *never* raised this lists-merger theory, either in their briefs to this court or in the district court. The majority, however, views merger of the New York and national lists as the critical event because it construes the pleadings to allege that "illegal aliens were being detained in punitive conditions of confinement in New York" with "no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be Arab or Muslim." Majority Op., *ante* at 40-41. This is not apparent in the record.

For example, when MDC Plaintiff Purna Raj Bajracharya was placed in restrictive confinement, federal officials knew that, approximately two weeks before the 9/11 attacks, he had been observed videotaping a Queens building that housed both a New York FBI unit and the Queens County District Attorney's Office. See *id.* at 19. They further knew that when Bajracharya—who had lived illegally in the United States for five years—was questioned about this conduct, he falsely claimed to be a tourist. While these circumstances

*First*, insofar as the November 2001 lists-merger decision is the critical factor in the majority's identification of a plausible punitive confinement claim, plaintiffs fail to plead a sufficient factual basis for ascribing the merger decision to any of the three DOJ Defendants. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. Their allegations—that Attorney General Ashcroft "ordered that" New York list

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did not conclusively link Bajracharya to terrorism, no more so did Zacarias Moussaoui's pre-9/11 interest in flight simulator training for large jets. What both circumstances did provide, however, was individualized suspicion for investigating these men's ties to terrorism, which in Moussaoui's case led to his conviction for participation in the 9/11 conspiracy. See *United States* v. *Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010).

Further, New York list detainees were *not* uniformly detained in "punitive" conditions—by which I understand the majority to be referring to highly restrictive conditions of confinement rather than to the intent with which such restrictions were imposed. Much less were they so confined for no reason other than ethnicity or religion. This is evident from the fact that the vast majority of the approximately 300 persons on the New York list at the time of the merger decision were Arab or Muslim. Nevertheless, no more than 84 detainees were ever restrictively confined in the ADMAX SHU. See OIG Report 2, 22, 111. The remainder were held in general confinement at the Passaic County Jail. The designation difference appears generally to have been based on whether an arrested illegal alien was designated "high interest," "of interest," or "interest undetermined" to the 9/11 investigation. See OIG Report 18, 111 (explaining that arrested illegal aliens in first category were generally held in high security confinement at MDC, while persons in latter two categories were generally held in less restrictive confinement at Passaic County Jail). Nevertheless, because the OIG Report provides no specifics on this point, and because plaintiffs allege that some of them were detained at the MDC "even though they had not been classified 'high interest,'" Fourth Am. Compl. ¶4. I do not pursue the matter further. Rather, I proceed to explain why plaintiffs fail, even under the majority's lists-merger theory, plausibly to plead a claim for punitive (or discriminatory) confinement, much less one supported by clearly established law.

detainees "be detained until cleared and otherwise treated as 'of interest,'" and that FBI Director Mueller and INS Commissioner Ziglar "were fully informed of this decision, and complied with it," Fourth Am. Compl. ("Compl.") ¶47—are plainly not based on personal knowledge and, in fact, are belied by the very OIG Report on which they rely to support their claims, see *id.* ¶3 n.1. That report states quite clearly that it was Associate Deputy Attorney General Stuart Levey who, at the end of the November 2, 2001 meeting with FBI and INS representatives, "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." OIG Report 56. To be sure, plaintiffs profess to incorporate the OIG Report into their pleadings only to the extent it is not "contradicted" by their own allegations. Compl. ¶3 n.1. But that begs the question of whether there is sufficient factual matter—either in plaintiffs' allegations or in the OIG Report—plausibly to ascribe merger responsibility to any of the DOJ Defendants. There is not. Nothing in the OIG Report indicates that Levey's merger decision was ever ordered or endorsed by Attorney General Ashcroft, FBI Director Mueller, or INS Commissioner Ziglar, or even communicated to them.

In concluding otherwise, the majority asserts that OIG identification of Levey as the lists-merger decisionmaker does not absolve Ashcroft of responsibility because the OIG appears not to have asked Ashcroft about his role in that decision. See Majority Op., *ante* at 50. To the extent this implies OIG negligence or oversight, that hardly supplies a factual basis for inferring Ashcroft's responsibility. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. In any event, negligence is belied by the OIG's detailed 198-page, single-spaced report, which includes a careful dis-

cussion of when, how, and by whom the merger decision was made. See OIG Report 55-57; see also Compl. ¶3 n.1 (describing "well-documented" OIG Report).[29]

Nor can the majority infer Ashcroft's responsibility simply by referencing "the importance of the merger and its implications for how [Ashcroft's] lawful original [hold-until-cleared] order was being carried out." Majority Op., *ante* at 51. Not only is the assertion conclusory, but also *Ashcroft* v. *Iqbal* holds that even facts "merely consistent with a defendant's liability . . . stop[ ] short of the line between possibility and plausibility." 556 U.S. at 681-82 (internal quotation marks omitted).

Insofar as the majority maintains that the OIG Report itself provides factual support for a plausible inference that Ashcroft, not Levey, was the ultimate merger decisionmaker, the conclusion does not bear close examination. For example, the majority highlights part of the OIG Report indicating that, at the same November 2 meeting where the lists-merger question arose, an INS official questioned the need for CIA (as well as FBI) checks prior to releasing 9/11 detainees, prompting Levey to reply that he would need to check to see if "'any detainees could be released without the CIA check.'" Majority Op., *ante* at 51 (quoting OIG Report 56). The majority reasons that if this statement is construed to

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[29] The majority responds that I mistakenly treat "the OIG reports as a repository of all . . . facts" relevant to plaintiffs' claims, "measur[ing] plausibility by the absence or presence of fact-findings" in these reports. See Majority Op., *ante* at 50. Not so. It is plaintiffs who support their pleadings by incorporating the OIG Reports. And it is the majority that maintains that statements in (or in the instant example, an omission from) the OIG Report, reasonably establish the plausibility of plaintiffs' claims. I herein demonstrate only why no "factual matter" supports such a conclusion. *Ashcroft* v. *Iqbal*, 556 U.S. at 678.

suggest Levey's "lack of authority" to make a decision as to CIA checks, it plausibly "supports the conclusion that Levey . . . had to take [the question] to more senior officials." *Id.* at 51-52. The majority then quotes another part of the OIG Report indicating that, in late November, when the INS Chief of Staff asked if DOJ would reconsider the CIA check requirement, Levey was still concerned about "'chang[ing] the CIA check policy without additional input.'" *Id.* at 52 (quoting OIG Report 62). It concludes that "if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance" and, therefore, it is plausible to think that he brought the question to Ashcroft. *Id.*

This reasoning is wholly speculative in assuming Levey's equal discomfort with the CIA check and merger decisions. Moreover, the majority's inference that Ashcroft was the consulted "senior official" is defeated by the very OIG Report on which it purports to rely. That report specifically identifies the person Levey consulted about continuing CIA checks: it was *not* Attorney General Ashcroft, but "David Laufman, the Deputy Attorney General's Chief of Staff." OIG Report 62. It was Laufman who advised Levey to continue the CIA checks. See *id.*[30] In its footnote acknowledgment of Laufman's role, the majority denies any intent to imply Ashcroft's responsibility for the CIA checks decision. It maintains

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[30] The majority can hardly have overlooked the OIG's identification of Laufman because it occurs in the very sentence of the Report that the majority quotes (in part) about Levey's continuing discomfort with making a CIA check decision in late November 2001. See OIG Report 62.

that "the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list merger decision on his own." Majority Op., *ante* at 52 n.27. What the majority fails to explain, however, is how that analogy supports an inference that Ashcroft made the merger decision.

While that could end this discussion, I further note that the OIG Report does not, in fact, permit one to infer from Levey's discomfort with canceling CIA checks on his own that he must have been equally uncomfortable with making the lists-merger decision. The OIG Report expressly states that Levey made the lists-merger decision "[a]t the conclusion of the [November 2] meeting" at which the subject was first raised to him. OIG Report 56. In short, there was no delay in Levey's making of the merger decision for him to consult with Ashcroft or anyone else, leaving the majority's reasoning on this point wholly without any basis in fact.

The majority responds that because "the issue of the New York list was discovered in October 2001, . . . surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior to* [the November 2] meeting." Majority Op., *ante* at 53 (emphasis in original). Even if this were an accurate account of events, it admits no more than a *possibility* that Levey consulted with anyone in the interim, much less that the person consulted was Ashcroft. But I do not think this account is accurate. While the OIG Report does detail an October 22, 2001 meeting at which DOJ, FBI, and INS representatives discussed "problems presented by the New York List," the critical fact omitted by the majority is that Levey was *not* in attendance. OIG Report 55. The OIG Report states that what Levey attended was a

"follow-up meeting" on November 2, 2001. It was there that he heard the competing views of the three interested entities, and made the merger decision. *Id.* at 55-56. The majority nevertheless deems it plausible that Levey learned about the October New York list discussion in advance of the November meeting because "Levey would not attend the November 2 meeting without knowing its agenda." Majority Op., *ante* at 53 n.29. This gave him "time to consult with more senior officials, *including Ashcroft*, before communicating a decision" at the November 2 meeting. *Id.* (emphasis added). Such attenuated reasoning stops well "short of the line between possibility and plausibility." *Ashcroft* v. *Iqbal*, 556 U.S. at 681-82 (internal quotation marks omitted). It is pure speculation.[31]

Thus, the pleadings, even with incorporation of the OIG Report, do not "contain sufficient factual matter" plausibly to ascribe the lists-merger decision to the DOJ

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[31] In another footnote, the majority further asserts that *Levey*'s communication with Ashcroft about the lists-merger decision, and Ashcroft's approval of the merger, find support in Ziglar's statement to the OIG that "he [*i.e.*, Ziglar] contacted the Attorney General's Office on November 7, 2001 [*i.e.*, five days after Levey had already made the merger decision], to discuss concerns about the clearance process, especially the impact of adding the New York cases to the INS Custody list." OIG Report 66. But the OIG Report makes clear that who Ziglar called was not Ashcroft himself, but his Chief of Staff, and that the person he in fact spoke with was Deputy Chief of Staff David Israelite. *Id.* at 66-67. Further, when Ziglar's quoted statement is read in the context of preceding and subsequent paragraphs, it is plain that his concerns related only to the "slow pace" of the FBI's clearance process, not to the conditions of confinement for New York list detainees held at the MDC. *Id.* These facts cannot admit a plausible inference that Ashcroft made the merger decision, much less that he made it for a punitive purpose.

Defendants. *Ashcroft* v. *Iqbal*, 556 U.S. at 678 (stating that well-pleaded facts must permit court to infer more than mere possibility of misconduct).

*Second*, even if plaintiffs could plausibly allege the DOJ Defendants' responsibility for the merger decision—which they cannot—plaintiffs fail to plead that these defendants thereby intended for plaintiffs to be held in the MDC's ADMAX SHU. The Complaint pleadings quoted at the start of the preceding point, see *supra* at 44-45, assert only that New York list detainees should be designated as "of interest" and held until cleared; they make no mention of any DOJ Defendant dictating aliens' continued confinement in the ADMAX SHU, or even their awareness of that result. Indeed, after merger, most New York list detainees continued to be held in general confinement at the Passaic County Jail. See OIG Report 111.

Moreover, the OIG Report's detailed discussion of the lists-merger decision gives no indication that the issue of continued restrictive—as opposed to general—confinement informed the merger decision in any way. The Report explains that INS officials opposed merger because of "how it would look when [INS] statistics regarding the number of September 11 detainees doubled overnight." OIG Report 55. The INS feared these high numbers would persist because of the time it was taking the FBI New York office to conduct clearance inquiries. The INS predicted that such delay would make it difficult for its attorneys to argue for continued detention without bail. See *id.* at 55-56.[32] Viewed in this context, the state-

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[32] At the same time that the OIG Report criticized the slow pace of FBI clearance, it acknowledged that the FBI New York office was under enormous pressure after the 9/11 attacks, both in investigating that event and in preventing future attacks. The New York of-

ment of Victor Cerda, Ziglar's Chief of Staff, explaining INS's opposition to the merger decision—"INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees," OIG Report 56—can only be understood to reference the INS policy of holding *all* 9/11 detainees without bond, a restriction that it did not apply to illegal aliens generally, see *id.* at 73. In sum, the merger debate between the INS and FBI was about whether illegal aliens on the New York list should continue to be detained at all, not about the conditions of their confinement. Thus, the debate admits no inference that the merger decision—by whomever made—was motivated by a desire to subject the MDC Plaintiffs to restrictive confinement.

*Third*, as the district court observed in dismissing plaintiffs' punitive confinement claim against the DOJ Defendants, plaintiffs do not allege that these defendants "were even aware" of the challenged restrictive confinement conditions at the MDC. *Turkmen III*, 915 F. Supp. 2d at 340. The majority nevertheless concludes that the Complaint admits an inference of such awareness, pointing to allegations that (1) FBI Director Mueller oversaw the 9/11 investigation from FBI Headquarters, see Compl. ¶¶56-57; and (2) the DOJ Defendants "received detailed daily reports of the arrests and detentions," *id.* ¶47. See Majority Op., *ante* at 42. I respectfully submit that these allegations admit no more than a possibility that the DOJ Defendants ever learned of the particular conditions of confinement imposed by BOP officials at the

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fice had by far the most leads to pursue, in the course of which it encountered the most illegal aliens. See OIG Report 2, 22 (indicating that, of the 762 illegal aliens arrested during the 9/11 investigation nationwide through August 6, 2002, 491 were arrested in New York).

MDC—or, indeed, at any of the other facilities around the country where the 738 illegal aliens arrested in the course of the 9/11 investigation were held until cleared.

The first allegation, that FBI Director Mueller oversaw the vast 9/11 investigation from headquarters—as opposed to the investigation being run out of one or more field offices—says nothing to support an inference that Mueller would therefore have had personal knowledge as to the particular confinement conditions imposed by the BOP on MDC detainees. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678 (holding that complaint must do more than plead facts "merely consistent with a defendant's liability" to cross the line from "possibility" to "plausibility"). To be sure, plaintiffs allege that the MDC Defendants formulated the challenged restrictive conditions "in consultation with the FBI." Compl. ¶65. But the FBI is an organization with more than 13,000 agents among 30,000 employees. Thus, this pleading hardly admits an inference that the FBI Director himself (much less the Attorney General or INS Commissioner) personally participated in or even knew of these consultations.

As to the second allegation highlighted by the majority, even assuming *arguendo* that it might admit an inference that the DOJ Defendants received daily reports on the number of illegal aliens detained in the 9/11 investigation, and on facts about such persons relevant to the ongoing terrorism investigation, it is pure conjecture to think that daily reports to federal authorities at this high level detailed the particular conditions of confinement under which each arrested alien was being held at the various facilities being used for that purpose. See *id.* Indeed, as the district court observed, plaintiffs themselves allege that the challenged conditions of confinement at the MDC were the "result" of the DOJ Defend-

ants' policy of holding illegal aliens until cleared, rather than a specifically approved element of that policy. *Turkmen III*, 915 F. Supp. 2d at 340 (citing Compl. ¶61).

Nor do those parts of the OIG Report cited by the majority support a different conclusion. See Majority Op., ante at 42-44. A BOP official's statement that "*the Department* [of Justice] was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities," OIG Report 19 (emphasis added), is too vague to ascribe personal awareness to the three DOJ Defendants in this case.[33] Moreover, the statement references how the BOP generally implemented the hold-under-clear policy throughout the country—which the panel concludes does not support plausible constitutional claims against these defendants. It does not reference the particular MDC restrictive confinement here at issue.

Insofar as the Attorney General's Deputy Chief of Staff recalled "one allegation of prisoner mistreatment being called to the attention of the Attorney General," *id.* at 20, a single complaint suggests rogue abuse, not the restrictive confinement *policy* at issue here. Further, the Attorney General's response was not to approve such conduct, but to call for a staff inquiry, hardly action implying punitive intent. See *id.*

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[33] Indeed, the OIG Report indicates that a number of DOJ witnesses—including Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division; his Deputy Alice Fisher, who oversaw terrorism issues in the division; David Israelite, the Deputy Chief of Staff to the Attorney General; and Southern District of New York Deputy U.S. Attorney David Kelley, the lead prosecutor on the 9/11 investigation—stated that they either had "no information" or "no input" into where detainees would be held or the conditions of their confinement at the various BOP facilities. *Id.* at 20.

BOP Director Kathy Hawk Sawyer did tell the OIG of conversations she had in the weeks following 9/11 with the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, in which these men expressed "concerns about detainees ability to communicate both with those outside the facility and with other inmates," and urged the BOP to take "policies to their legal limit" to prevent such communication in order "to give officials investigating the detainees time to 'do their job.'" *Id.* at 112-13. But statements by members of the *Deputy Attorney General*'s staff admit no more than a "possibility" that the *Attorney General* himself was aware of their content. *Ashcroft* v. *Iqbal*, 556 U.S. at 678. That conclusion applies with even more force to the FBI Director or INS Commissioner. Moreover, the Laufman-Wray communications appear to have urged a communication blackout for all 9/11 detainees, not just those held at the MDC. See OIG Report 113. Thus, they cannot support an inference that the DOJ Defendants knew the particular restrictive conditions imposed in that facility. Further, it appears that the BOP lifted the communications blackout on 9/11 detainees—even at the MDC—by mid-October 2001, see *id.* at 114, which is before the November merger decision that is the majority's triggering date for a plausible claim of punitive and discriminatory confinement by MDC Plaintiffs. Thus, communications before the November merger, by persons other than the DOJ Defendants, about a condition of confinement that BOP lifted before the merger decision was made, support no inference as to what the DOJ Defendants knew about conditions of confinement at the MDC in November 2001.[34]

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[34] For the same reasons that I think pleadings related to the lists-

*Fourth*, even if plaintiffs' allegations were sufficient to admit an inference that the DOJ Defendants knew that, as a consequence of the lists' merger, MDC Plaintiffs would remain in restrictive confinement, that would be insufficient to imply the requisite specific intent. As the Supreme Court explained in *Ashcroft* v. *Iqbal*, "purposeful" conduct "requires more than intent as volition or intent as awareness of consequences." 556 U.S. at 681. It requires that a decisionmaker undertake a course of action "'because of,' not merely 'in spite of' the action's adverse effects." *Id.* (internal quotation marks and citation omitted). Here, the pleadings provide no factual basis to conclude that anyone made the merger decision *because* it would keep the MDC Plaintiffs in restrictive confinement.

*Fifth*, plaintiffs fail in any event plausibly to allege facts admitting an inference that their continued MDC restrictive confinement after November 2001 was "arbitrary or purposeless" to any legitimate objective, so that plaintiffs' real intent must have been punitive. *Bell* v. *Wolfish*, 441 U.S. at 539. That inference is, I submit, foreclosed by the "obvious" and "more likely" explanation for the challenged action: the DOJ Defendants' determination to identify and apprehend anyone involved in the 9/11 attacks and to safeguard the nation from further terrorist attacks. *Ashcroft* v. *Iqbal*, 556 U.S. at 681-82.

This non-punitive motivation is no after-the-fact invention. The Supreme Court recognized it to motivate the entire vast investigation that followed 9/11 and pursuant

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merger decision do not admit a plausible inference that the DOJ Defendants knew of the particular restrictive conditions of confinement at the MDC, I do not think they admit a plausible inference that the DOJ Defendants knew that such conditions were being imposed without individualized suspicion of terrorist connections.

to which plaintiffs were arrested and confined. See *id.* at 667 (stating that "FBI and other entities within the Department of Justice began an investigation of vast reach to identify the [9/11] assailants and prevent them from attacking anew," dedicating "more than 4,000 special agents and 3,000 support personnel to the endeavor"). The OIG Report makes the same point. See OIG Report 12-13 (noting Attorney General's directive that all components of DOJ "focus their efforts on disrupting any additional terrorist threats," and general understanding within DOJ that every available legal means should be used "to make sure that no one else was killed").

The panel majority acknowledges that national security concerns "might well" have motivated defendants' challenged actions, see Majority Op., *ante* at 106, including the merger decision on which it relies to deny dismissal to the DOJ Defendants, see *id.* at 54-55 (quoting Levey's statement to OIG that, in merging lists, "he wanted to err on the side of caution so that a terrorist would not be released by mistake," OIG Report 56). Indeed, the OIG Report specifically concludes that the merger decision "was supportable, given the desire not to release any alien who might be connected to the [9/11] attacks or [to] terrorism." OIG Report 71. Nevertheless, the majority maintains that, even if the DOJ Defendants were intent on ensuring national security, the mismatch between that object and the restrictive confinement conditions at the MDC was so great (in the absence of individualized suspicion) as to be deemed arbitrary and purposeless, admitting an inference of punitive intent. See Majority Op., *ante* at 55-58.

Whether a court, upon identifying an obvious nonpunitive intent for challenged conduct, can nevertheless allow plaintiffs to pursue a substantive due process claim

on a theory of implied punitive intent is not apparent. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. at 683 (rejecting discrimination claim in such circumstances); *Block* v. *Rutherford*, 468 U.S. at 589 (instructing that once court identifies legitimate purpose for challenged confinement policy, its inquiry should end because "further 'balancing' result[s] in an impermissible substitution of [the court's] views" for those of confining authorities). Certainly, the conclusion is not placed "beyond debate" by clearly established law, without which defendants must be afforded qualified immunity. *Carroll* v. *Carmon*, 135 S. Ct. at 350; *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2083.

In urging otherwise, the majority cites *Bell* v. *Wolfish*, 441 U.S. 520, and *Iqbal* v. *Hasty*, 490 F.3d 143. See Majority Op., *ante* at 61. *Bell* v. *Wolfish* held that if a condition of pre-trial confinement "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment." 441 U.S. at 539. But that simply states a "general proposition," which affords "little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2084. Moreover, because *Wolfish* itself rejected all constitutional challenges to the restrictive conditions there at issue, see 441 U.S. at 560-62, it hardly made the parameters of the substantive due process ban on punitive pre-trial confinement "sufficiently clear that every reasonable official would have understood" that the restrictive conditions here at issue were arbitrary or purposeless to ensuring national security in the absence of individualized suspicion of terrorism, *Ashcroft* v. *Al-Kidd*, 131 S. Ct. at 2083 (holding that unless law is so clearly established, official is entitled to qualified immunity).

As for *Iqbal* v. *Hasty*, this court did not there place beyond dispute the need for individualized suspicion of terrorism to place 9/11 detainees in restrictive confinement. Indeed, that case made no mention of the lack of such suspicion in observing that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Iqbal* v. *Hasty*, 490 F.3d at 169. In fact, this statement was made in concluding that plaintiffs had adequately alleged Warden Hasty's express punitive intent. That conclusion having been reached under a pleading standard abrogated by the Supreme Court in *Ashcroft* v. *Iqbal*, 556 U.S. at 680, *Hasty*'s preclusive effect here is open to question. But even if we assume that this court there correctly concluded that the prohibition on punitive restraints is clearly established in any circumstance where a defendant acts with the *express* intent to punish, *Hasty* did not hold that the same conclusion applies in the myriad circumstances where plaintiffs propose to *imply* intent by challenging the reasonableness of a restraint relative to a legitimate objective. Certainly, *Hasty* did not hold it well established that the restrictive confinement of lawfully arrested persons without individualized suspicion of a security risk is implicitly punitive.

Meanwhile, considerable law indicates that individualized suspicion is generally *not* required to impose restrictive conditions of confinement on lawfully arrested detainees in pursuit of a legitimate security objective. *Block* v. *Rutherford*, 468 U.S. at 585-87, upheld a blanket prohibition on pre-trial detainees' contact visits, observing that the "identification of those inmates who have

propensities for violence, escape, or drug smuggling is a difficult if not impossible task," *id.* at 587. *Bell* v. *Wolfish*, 441 U.S. at 558, rejected a challenge to body cavity searches of all pre-trial detainees after contact visits even though there had been only a single past incident of contraband being concealed in a body cavity. *Whitley* v. *Albers*, 475 U.S. at 316, held, in the context of a prison riot, that a "shoot low" (*i.e.*, below vital organs) policy could be applied without individual suspicion to any prisoner climbing stairs leading to where hostages were being held. Most recently, *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. at 1523, upheld visual strip searches of all arrestees without individualized suspicion.[35]

The reasoning of these cases applies with equal, if not more, force here where defendants had an obvious and legitimate interest in identifying anyone connected with the 9/11 attacks and in safeguarding the nation from further terrorist attacks. Because the attacks were carried out by Arab Muslim aliens who proclaimed themselves members of al Qaeda, it is "no surprise" that authorities focused their investigative and preventative attention on persons encountered in the course of the FBI's 9/11 in-

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[35] The majority attempts to distinguish these cases by saying that, in each, the Supreme Court did not state that individualized suspicion was not required but, rather, determined that the challenged restrictions reasonably related to the legitimate object of prison security. See Majority Op., *ante* at 58 n.31. The reasoning is perplexing. Implicit in the rejection of challenges to generally applicable restrictive conditions of confinement is the conclusion that no individualized suspicion was necessary for the condition reasonably to relate to the legitimate object of prison security. In any event, the majority points to no case holding a generally applicable restrictive condition to fail the reasonably related inquiry for lack of individualized suspicion, and certainly not one doing so in the context of a condition whose professed object is national security.

vestigation, who were not lawfully in this country, and who fell within the same ethnic and religious group as the hijackers or as those targeted for recruitment by al Qaeda. *Ashcroft* v. *Iqbal*, 556 U.S. at 682 (recognizing that circumstances of 9/11 attacks necessarily produced "disparate, incidental impact on Arab Muslims"); see also *United States* v. *Farhane*, 634 F.3d 127, 132 n.4 (2d Cir. 2011) (discussing "fatwa" proclaiming it religious duty of Muslims worldwide to kill Americans and their allies wherever found). Moreover, given (1) the inherent difficulty in identifying in advance of an FBI-CIA investigation who, among such a group of illegal aliens, might have terrorist connections; (2) the serious risk of murderous harm posed by persons with such connections (even while incarcerated[36]); and (3) events following 9/11 fueling fears of further imminent attacks,[37] I cannot conclude that established precedent would have alerted the Attorney General, the FBI Director, and the INS Commissioner that, in the absence of individualized suspicion of terrorist connections, it was arbitrary or purposeless to national security to hold such illegal aliens in restrictive, rather than general, confinement pending clearance.

In disputing that conclusion, the majority mischaracterizes this dissent to assert that "because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that were targeted for recruitment by al Qaeda, they may be held in the ADMAX SHU without any reasonable suspicion of terrorist activity." Majority Op., *ante* at 56. I suggest no such

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[36] See *infra* at 67-68 (discussing actions of Omar Abdel Rahman and Mamdouh Mahmud Salim while incarcerated).

[37] See *supra* at 28 & n.19 (detailing anthrax scare, airliner crash, shoe bomb attempt, and journalist beheading, all within five months of 9/11 attacks).

thing. In fact, no plaintiff was "held" on anything less than probable cause, specifically, probable cause to think the alien was in violation of federal immigration laws. Moreover, the majority itself identifies no plausible constitutional claim against the DOJ Defendants for *holding* 9/11 detainees until they were cleared of terrorism connections—even though detainees were overwhelmingly Arab and Muslim, and detention continued after the lists-merger decision even without individualized suspicion of terrorism for the New York list detainees. See Majority Op., *ante* at 39-40. Nor does it identify any precedent clearly establishing that substantive due process does not permit detention to be restrictive in such circumstances unless there is individualized suspicion of terrorist connections. It is in the absence of such precedent that I assert the DOJ Defendants are entitled to qualified immunity.

Nor do I suggest that government officials can "hold[ ] someone in the most restrictive conditions of confinement available simply because he happens to be—or, worse yet, appeared to be—Arab or Muslim." Majority Op., *ante* at 57. Rather, as I explain in discussing plaintiffs' equal protection claim, the pleadings do not admit a plausible inference that the MDC Plaintiffs were restrictively confined *because of* their ethnicity or religion. See *infra* Part II.B.

The majority further misconstrues the dissent "to imply that once 'national security' concerns become a reason for holding someone," there is no need to consider whether restrictive conditions reasonably relate to that objective. See Majority Op., *ante* at 55. Not so. *Bell* v. *Wolfish* makes plain that neither confinement, nor any condition of confinement, can be imposed on pre-trial detainees *for the purpose of punishment*. See 441 U.S. at

535. Thus, I have never suggested that a legitimate national security purpose for holding someone supports the further imposition of restrictive conditions of confinement without any need to consider whether such conditions also reasonably relate to the same objective, or whether they are so arbitrary and purposeless as to admit an inference that their real purpose was punishment. What I assert is that an arbitrary and purposeless conclusion as to the restrictive conditions here at issue is not so beyond debate that the DOJ Defendants can be denied qualified immunity.

To explain, isolating the 9/11 detainees confined at the MDC from one another and from the outside world while clearance investigations were conducted ensured that—in the event detainees were found to have terrorist connections—they would not have been able to communicate in ways that either furthered terrorist plans or thwarted government investigations. Further, strict restrictions on prison movement and cell conditions minimized the possibility that, while clearance was pursued, an as-yet-unidentified terrorist associate would threaten either national or prison security. We need only look to our own precedent to understand why the executive would reasonably have had such concerns. In the two years before the 9/11 attacks, convicted terrorist Omar Abdel Rahman ("the Blind Sheikh") had managed to use his lawyer to communicate from prison to followers in Egypt that he now sanctioned renewed terrorist attacks. See *United States* v. *Stewart*, 590 F.3d 93, 163-65 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part). Also in the year before 9/11, pre-trial detainee Mamdouh Mahmud Salim, charged with participating in the bombings of United States embassies in Africa, viciously attacked a guard at New York's Metropolitan Correctional

Center with a sharpened plastic comb, causing the guard both to lose an eye and to suffer permanent brain damage. See *United States* v. *Salim*, 690 F.3d 115, 119-20 (2d Cir. 2012). Both men had been held in some degree of restrictive confinement. Events after 9/11, suggesting ongoing terrorist plots, see *supra* at 28 & n.19, would only have reinforced the executive's view that national security required that the MDC Plaintiffs be restrictively confined until authorities could determine whether they had terrorist connections. The majority cites no established precedent to the contrary. Nor can it ground an arbitrary and purposeless conclusion in the fact that not all New York list detainees were held in restrictive confinement pending clearance. See Majority Op., *ante* at 59. As the Supreme Court stated in *Bell* v. *Wolfish*, "the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." 441 U.S. at 554. Its singular concern is that defendants' real purpose not be punitive.

With the benefit—or handicap—of hindsight, persons might now debate how well the challenged restrictive confinement policy at the MDC served national security interests.[38] But it is no more a judicial function to decide how best to ensure national security than it is to decide how best to operate a detention facility. See *id.* at 539. Rather, on qualified immunity review, our task is to de-

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[38] See 9/11 Report 339 (cautioning, with respect to judging actions leading and responding to 9/11 attacks, that hindsight can both make things seem "crystal clear" that at relevant time were "obscure and pregnant with conflicting meanings," and make it "harder to reimagine" the "preoccupations and uncertainty" of a past time as memories "become colored" by knowledge of what happened and was written later).

termine whether the MDC Plaintiffs plausibly allege a substantive due process violation that, in late 2001, was so clearly established by precedent as to put the illegality of the DOJ Defendants' actions beyond debate. See *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2083. For the reasons stated herein, I conclude that is not this case and that the DOJ Defendants are, therefore, entitled to dismissal of plaintiffs' punitive confinement claim on the ground of qualified immunity.

2. *MDC Defendants*

By contrast to the DOJ Defendants, MDC Defendants Hasty and Sherman were personally involved in the MDC Plaintiffs' restrictive confinement in the ADMAX SHU both before and after the November 2001 merger decision.[39] As warden and deputy warden of the MDC, however, these defendants have a particular claim to judicial deference in determining the confinement conditions reasonably related to legitimate security interests. See *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1517; *Bell* v. *Wolfish*, 441 U.S. at 548. The majority concludes that no such deference is warranted here because the MDC Defendants (1) imposed the conditions without adequate supporting information or an evaluation of their propriety, and (2) maintained the restrictive conditions even after learning that they were not supported by individualized suspicion of the detained aliens' terrorist connections. See Majority Op., *ante* at 63-65. Moreover, the majority observes that this court denied qualified immunity on a materially identical substantive due process claim in *Iqbal* v. *Hasty*, 490 F.3d at 143, 168-69, and iden-

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[39] The decision to impose strict restrictive confinement was apparently made at the headquarters level of the BOP, see OIG Report 19, with the MDC Defendants establishing the conditions effecting such confinement, see Compl. ¶¶ 24, 26, 68, 75.

tifies no reason to rule differently here. See Majority Op., *ante* at 73. I respectfully disagree.

*First*, plaintiffs' pleadings do not admit a plausible inference that Hasty and Sherman imposed restrictive conditions of confinement without any supporting information or assessment of propriety. As to the latter, the OIG Report recounts that, immediately after the 9/11 attacks, BOP Headquarters ordered that "all detainees who were 'convicted of, charged with, associated with, or in any way linked to terrorist activities' . . . be placed in the highest level of restrictive detention." OIG Report 112. A plausible inference of punitive intent cannot reasonably be drawn from the MDC Defendants' carrying out this order without making an independent assessment of its categorical need. The obvious and more likely motivation for their doing so is national and prison security. Defendants reasonably deferred to their superiors' assessment that, in the aftermath of a devastating terrorist attack, lawfully arrested illegal aliens, whom the FBI and CIA were investigating for possible terrorist connections, should be kept "in the most secure conditions available until the suspects could be cleared of terrorist activity." *Ashcroft* v. *Iqbal*, 556 U.S. at 683. The Supreme Court has already held that such motivation does not admit a plausible inference of discriminatory intent. See *id.* No more will it admit a plausible inference of punitive intent.

Further, because it is undisputed that the FBI had designated each MDC Plaintiff as a person "of high interest," or "of interest" in their ongoing terrorism investigation, and that BOP employees relied on this designation in imposing restrictive confinement, see, *e.g.*, Compl. ¶¶1-2, 4; see also OIG Report 111-12, 126, 158, it cannot be said that the MDC Defendants acted without *any* in-

formation so as to admit an inference that their conduct was arbitrary or purposeless. See generally *Martinez* v. *Simonetti*, 202 F.3d 625, 635 (2d Cir. 2000) (holding that police may reasonably rely on information provided by other officers even when confronted with conflicting accounts). Thus, these allegations do not plausibly imply discriminatory intent.

*Second*, insofar as plaintiffs fault the MDC Defendants for maintaining them in restrictive confinement even after learning that the FBI's designations were not based on individualized suspicion, I have already explained with reference to the DOJ Defendants why established precedent does not support that conclusion, much less alert every reasonable federal official that restrictive confinement in the absence of individualized suspicion of a security threat violates substantive due process. See *supra* at 62-63.

*Iqbal* v. *Hasty*, 490 F.3d 140, does not dictate otherwise. As discussed *supra* at 61-62, the court there applied a "notice pleading standard" to "general allegations of knowledge" to identify alleged "purposeful infliction of restraints that were punitive in nature." *Id.* at 169. In thus identifying *express* punitive intent, *Hasty* never discussed whether the pleadings otherwise plausibly *implied* intent. Although the MDC Defendants were not parties in *Ashcroft* v. *Iqbal*, the Supreme Court's rejection of the pleading standard employed in *Hasty*, see 556 U.S. at 684, does not admit preclusive effect to *Hasty*'s assessment of the sufficiency of plaintiffs' specific intent claims, particularly insofar as they imply intent.[40]

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[40] Indeed, when reviewing *Turkmen I* in light of *Ashcroft* v. *Iqbal*, we vacated the district court's decision and remanded "for further proceedings consistent with the standard articulated in *Twombly* and *Iqbal*." *Turkmen II*, 589 F.3d at 546-47. On remand, the district

Accordingly, I would dismiss plaintiffs' policy-challenging punitive confinement claim against the MDC Defendants, as well as the DOJ Defendants, on grounds of qualified immunity.[41]

**B. Discriminatory Confinement**

To state a Fifth Amendment claim for discriminatory confinement, a plaintiff must plead sufficient factual matter to show that defendants adopted the challenged restrictive confinement policy not for a neutral reason "but for the purpose of discriminating on account of race, religion, or national origin." *Ashcroft* v. *Iqbal*, 556 U.S. at 676-77 (explaining that standard is not satisfied by pleadings of intent as "volition" or "awareness of consequences"; instead, pleadings must plausibly allege that defendant undertook conduct "because of," not merely "in spite of[,]" its discriminatory effect). The Supreme Court articulated this standard in reversing this court's determination that these plaintiffs' original complaint stated a plausible claim for discriminatory confinement based on race, religion, or national origin. See *id.* at 687. While acknowledging that plaintiffs had pleaded facts "consistent with" purposeful discrimination, the Court concluded that such a claim was not plausible in light of the "obvious," and "more likely" non-discriminatory reason for the challenged confinement policy, specifically, national security concerns about "potential connections" between illegal aliens identified in the course of the FBI's investigation of the 9/11 attacks and Islamic terrorism.

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court did not cite *Hasty* in identifying a plausible punitive confinement claim against the MDC Defendants. See *Turkmen III*, 915 F. Supp. 2d at 341. These developments do not comport with a conclusion that *Hasty* is dispositive on this appeal.

[41] This dissent does not pertain to plaintiffs' non-policy claims of "unofficial abuse" against the MDC Defendants.

*Id.* at 682-83 (holding that, where all pleadings "plausibly suggest[] is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," plaintiffs "would need to allege more by way of factual content to nudge [their] claim[s] of purposeful discrimination across the line from conceivable to plausible" (internal quotation marks omitted)).

One might have thought that put plaintiffs' policy-challenging claims of discriminatory confinement to rest. The majority, however, affords the MDC Plaintiffs another opportunity to pursue these claims, concluding that the newest amended complaint now pleads sufficient facts to show that it is "not more likely" that the MDC Plaintiffs were held in restrictive confinement because of suspected ties to terrorism. Majority Op., *ante* at 83.

The pleadings the majority cites to support this conclusion as to both the DOJ and MDC Defendants can be summarized as follows: (1) the New York FBI office expressly relied on race, religion, ethnicity, and national origin in targeting persons identified in their 9/11 investigation for detention; (2) the DOJ Defendants were aware of and condoned such discriminatory intent by merging the New York FBI detainee list with the INS national detainee list, knowing that the former list was not supported by individualized suspicion of a terrorist threat; (3) the MDC Defendants also knew there was no individualized suspicion tying the aforementioned detainees to terrorism when they confined them in the ADMAX SHU; and (4) the MDC Defendants falsely reported that MDC staff had classified the ADMAX SHU detainees as "high security" based on an individualized assessment

when no such assessment was ever conducted. See *id.* at 55-62. I am not persuaded.

*First*, the amended complaint's pleadings of purposeful FBI discrimination are not materially different from those considered in *Ashcroft* v. *Iqbal*. See 556 U.S. at 669 (acknowledging that plaintiffs pleaded purposeful designation of detainees based on race, religion, or national origin); see also *id.* at 698 (Souter, J., dissenting) (detailing specific allegations that FBI officials implemented policy that discriminated against Arab Muslim men based solely on race, religion, or national origin). Thus, we are bound by the Supreme Court's holding that such allegations are inadequate to plead plausible discriminatory intent in light of the obvious and more likely national security explanation for the challenged confinement. See *id.* at 681-82.

Not insignificantly, in reaching this conclusion, the Supreme Court acknowledged that it was the perpetrators of the 9/11 attacks who injected religion and ethnicity into the government's investigative and preventative efforts. The Court stated that the attacks "were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples." *Id.* at 682. Where a terrorist group thus effectively defines itself by reference to religion and ethnicity, see *supra* at 64, the Constitution does not require investigating authorities to ignore that reality nor to dilute limited resources casting a wider net for no good reason. It is "no surprise" then that a law enforcement policy—including a restrictive confinement policy—legitimately aimed at identifying persons with connections to the 9/11 attacks and prevent-

ing further attacks "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Ashcroft* v. *Iqbal*, 556 U.S. at 682; see also *Brown* v. *City of Oneonta*, 221 F.3d at 337 (observing that racial description of perpetrator, "which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found," even though it might well have disparate impact on minority groups).[42]

Thus, as in *Ashcroft* v. *Iqbal*, plaintiffs cannot plausibly imply proscribed discriminatory intent from pleadings merely "consistent with" the New York FBI's alleged purposeful targeting and detention of aliens based on ethnicity and religion. 556 U.S. at 681-82. Here, those characteristics originated with the terrorists not the state, the FBI actions were limited to aliens not lawfully in this country and encountered in the course of the 9/11 investigation, and the obvious and more likely reason for the challenged confinement was ensuring national security in the face of an Islamic terrorist threat.[43]

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[42] In recently forbidding investigative stereotyping, the Department of Justice nevertheless stated that, "in conducting activities directed at a specific criminal organization or terrorist group whose membership has been identified as overwhelmingly possessing a listed characteristic, law enforcement should not be expected to disregard such facts in taking investigative or preventive steps aimed at the organizations' activities." U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* 4 (Dec. 2014), available at http://1.usa.gov/1ytxRoa.

[43] In discussing the actions of the New York FBI office—and particularly its maintenance of its own list of 9/11 detainees—the OIG and the majority reference that office's tradition of independence from headquarters. See Majority Op., *ante* at 24 n.12 (citing OIG Report

*Second*, the DOJ Defendants' purported involvement with the lists-merger decision also cannot imply these defendants' discriminatory intent. As I have already explained with respect to punitive intent, plaintiffs fail plausibly to plead these defendants' involvement with that decision. See *supra* at 44-51.

In any event, the merger decision—by whomever made—applied equally to all New York list detainees, the larger number of whom were not subjected to restrictive confinement, but housed in general prison population at the Passaic County Jail, even though they shared the same racial, religious, and national identities as the MDC Plaintiffs. See *supra* at 51-52. Such circumstances do not permit discriminatory intent plausibly to be inferred from the merger decision. See generally *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (holding that inference of age discrimination cannot be drawn from "replacement of one worker with another worker insignificantly younger"); *James* v. *N.Y. Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) (stating that *prima facie* case for discrimination required proof of em-

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54). Such independence does not plausibly imply rogue conduct. To the contrary, in the years before 9/11, the New York FBI office led the nation's pursuit of Islamic terrorism, as is evident in a number of exemplary investigations. See, *e.g.*, 9/11 Report 72 (commending "superb investigative and prosecutorial effort" of New York FBI and U.S. Attorney's Office in identifying and convicting perpetrators of first World Trade Center attack, as well as the "Blind Sheikh" and Ramzi Yousef); see also *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93 (affirming New York convictions for terrorist bombings of American embassies in Africa based on guilty verdicts returned only weeks before 9/11). In short, at the time of the 9/11 investigation, there was no FBI field office with greater knowledge of, or experience investigating, Islamic terrorism than that in New York. This, and not invidious discriminatory intent, is the obvious and more likely explanation for its independence.

ployer "preference for a person not of the protected class"). Indeed, the conclusion that a plaintiff cannot urge an inference of discriminatory purpose from his receipt of treatment less favorable than most members of his own protected class is so obvious that we generally pronounce it summarily. See, *e.g.*, *Fleming* v. *MaxMara USA, Inc.*, 371 F. App'x 115, 117 (2d Cir. 2010) (summary order). District court opinions in this circuit to the same effect are countless. See, *e.g.*, *Baez* v. *New York*, 56 F. Supp. 3d 456, 467-68 (S.D.N.Y. 2014) (collecting cases); *White* v. *Pacifica Found.*, 973 F. Supp. 2d 363, 381 (S.D.N.Y. 2013) (collecting cases). Thus, no clearly established law would have alerted every reasonable official that the lists-merger decision violated equal protection.[44]

In concluding otherwise, the majority dismisses the Passaic assignments as a "red herring." Majority Op., *ante* at 85. The label will not stick. The reality that most Arab Muslim detainees on the New York list were *not* held in restrictive confinement precludes a plausible in-

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[44] The majority recognizes that the precedent cited herein undermines plaintiffs' equal protection claim, but it maintains that these holdings properly apply on summary judgment review, not dismissal. See Majority Op., *ante* at 85 n.39. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), does not admit that conclusion. Therein, the Supreme Court observed that it had earlier ruled "at the summary judgment stage" that an inference of anticompetitive collusion could not be drawn from parallel conduct. *Id.* at 554 (citing *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1976)). It then applied that same rule at the motion to dismiss stage, holding that where plaintiffs' pleadings, taken as true, show only parallel conduct, a conspiracy is not plausibly alleged. See *id.* at 556. The same principle applies here. Just as evidence of differential treatment within a suspect class is insufficient on summary judgment to demonstrate proscribed discriminatory intent, allegations of such differential treatment are insufficient to plead discriminatory intent so as to defeat a motion for dismissal.

ference that arresting FBI agents were intent on discriminating against Arab Muslims in assigning a minority of New York detainees to the MDC. Thus, even if the lists-merger decision can be understood to manifest the DOJ Defendants' "deference to others' designation of detainees for particular facilities," *id.* at 84, that is not a factual basis for plausibly inferring their discriminatory intent against MDC detainees. To overcome this hurdle, the majority parenthetically suggests that "for all [the DOJ Defendants] knew, all" New York list detainees were held in restrictive confinement. *Id.* This is, again, pure speculation. Moreover, because the facts are to the contrary, a plaintiff (or a panel majority) looking to locate invidious intent in defendants' *possible misunderstanding* of the confinement circumstances surely needs to identify some factual basis for its hypothesis. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. That is missing here.

In sum, plaintiffs fail plausibly to plead either that DOJ Defendants were responsible for the lists-merger decision or that the decision was animated by discriminatory intent.

*Third*, allegations that the DOJ and MDC Defendants maintained the challenged restrictive confinement after learning that the FBI designations were not based on individualized suspicion of terrorist threats are also inadequate to conclude that defendants were "not more likely" concerned with ensuring national and prison security. Majority Op., *ante* at 83. Indeed, the conclusion is foreclosed by *Ashcroft* v. *Iqbal*, 556 U.S. at 681-82, because the discrimination allegations there deemed implausible in light of the more likely national security explanation for defendants' actions included assertions that the MDC Plaintiffs' restrictive confinement was not supported by "any individual determination" that such restrictions

were "appropriate or should continue." First Am. Compl. ¶97, App. to Pet. for Cert. 173a, *Ashcroft* v. *Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), available at http://1.usa.gov/1CfHJQF. Thus, the majority cannot suggest that when the Supreme Court there rejected an equal protection challenge to efforts by "the Nation's top law enforcement officers . . . to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," *Ashcroft* v. *Iqbal*, 556 U.S. at 682-83, it did not understand that plaintiffs were complaining of the lack of prior individualized suspicion. See Majority Op., *ante* at 82-83.[45]

In any event, and as already explained, courts have upheld the imposition of restrictive conditions of confinement on lawfully arrested persons without requiring individualized suspicion of a security threat, recognizing both the difficulty in identifying which detainees pose the particular risk needing to be addressed, and the serious harm that can ensue from a failure to do so. See *supra* at 62-63. Thus, no clearly established law would have alerted reasonable officials that restrictive confinement without individualized suspicion was unconstitutionally punitive or discriminatory in the circumstances presented here.

*Fourth*, allegations that the MDC Defendants (1) failed to follow BOP procedures requiring "individualized determination of dangerousness or risk" for restrictive confinement, and (2) approved documents falsely representing that such determinations had been made, also do not render it "not more likely" that the challenged conduct was motivated by national security. See Majori-

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[45] The lists-merger pleadings support no different conclusion for reasons just discussed. See Majority Op., *ante* at 84-85.

ty Op., *ante* at 86. This court has already granted qualified immunity to some of these same MDC Defendants on a procedural due process challenge to their failure to follow BOP procedures in connection with the same challenged confinement. See *Iqbal* v. *Hasty*, 490 F.3d at 167-68. In doing so, moreover, *Hasty* acknowledged that the "separation" of the MDC Plaintiffs "from the general prison population could be reasonably understood . . . to relate to matters of national security, rather than an ordinary criminal investigation." *Id.* at 167. *Hasty* further noted that, in 2001-2002, neither the Supreme Court nor this court had considered whether BOP administrative segregation procedures had to be afforded "to persons detained under special conditions of confinement until cleared of connection with activities threatening national security." *Id.*

The fact that plaintiffs here use procedural failures to imply discriminatory intent rather than to assert a denial of procedural due process warrants no different qualified immunity conclusion. As the OIG Report indicates, by October 1, 2001, BOP Headquarters had effectively ceded "individualized" risk assessment responsibility for 9/11 detainees to the FBI. A memorandum of that date from Michael Cooksey, the BOP Assistant Director for Correctional Programs, "directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be 'reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities.'" OIG Report 116 (quoting Cooksey's October 1, 2001 memorandum). In these circumstances, even if the MDC Defendants might be faulted for approving documents suggesting individualized risk assessments of MDC Plain-

tiffs that were not made by the BOP, their actions cannot plausibly imply discriminatory intent because they are obviously and more likely explained by reliance on the FBI's designations of each MDC Plaintiff as a person "of high interest," or "of interest," to the ongoing terrorism investigation.

In sum, as to both the DOJ and MDC Defendants, the pleadings highlighted by the majority are insufficient to render "not more likely" what the Supreme Court in *Ashcroft* v. *Iqbal* held "obvious" and "more likely": MDC Plaintiffs were restrictively confined pending FBI-CIA clearance for the legitimate purpose of ensuring national security. 556 U.S. at 681-82. Moreover, to the extent the majority implies discriminatory intent from the MDC Plaintiffs' restrictive confinement without individualized suspicion of terrorist connections, no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance. Accordingly, I conclude that both the DOJ and the MDC Defendants are entitled to dismissal of the MDC Plaintiffs' equal protection claims on the ground of qualified immunity.[46]

### C. Fourth Amendment Claim

As the majority acknowledges, plaintiffs do not assert that the Fourth Amendment absolutely prohibited them from being strip-searched while incarcerated at the

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[46] Because I would dismiss plaintiffs' equal protection claims, I would also dismiss their § 1985 claims. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) ("The language [in § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."); accord *Reynolds* v. *Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012).

MDC. See Majority Op., *ante* at 95. Rather, plaintiffs contend that the frequency with which they were strip searched—every time they were removed from or returned to their cells, or randomly even when not so moved, "even when they had no conceivable opportunity to obtain contraband"—was constitutionally unreasonable. Compl. ¶112. They further allege that the manner in which they were strip searched—with female officers present or in view of other prisoners and staff, with prohibited videotaping, or with humiliating comments—was unconstitutional. See *id.* ¶¶112-15.

Insofar as plaintiffs seek damages from MDC Defendants Hasty and Sherman for the challenged strip search policy, *Ashcroft* v. *Iqbal* does not admit a theory of supervisory liability on a *Bivens* claim. See 556 U.S. at 676-77. Rather, plaintiffs must plausibly plead that each *Bivens* defendant, "through the official's own individual actions, has violated the Constitution." *Id.* at 676. Plaintiffs do not allege that Hasty and Sherman themselves ever participated in any of the challenged strip searches or that they personally developed the policy. The latter conduct is attributed to MDC First Lieutenant Joseph Cuciti. See Compl. ¶111.

The majority nevertheless concludes that plaintiffs carry their *Iqbal* pleading burden by alleging that (1) "Hasty ordered [MDC Captain] Lopresti and Cuciti to design extremely restrictive conditions of confinement," which were "then approved and implemented by Hasty and Sherman," *id.* ¶75; and (2) many of the strip searches "were documented in a 'visual search log' created by MDC staff for review by MDC management, including Hasty," *id.* ¶114. The majority holds that these pleadings are sufficient to allege Hasty's and Sherman's personal involvement "in creating and executing" the chal-

lenged strip-search policy, or at least their awareness of the searches "based on the search log." Majority Op., *ante* at 97-98. It then further concludes that neither Hasty nor Sherman is entitled to qualified immunity because, at the time of the MDC Plaintiffs' confinement, it was clearly established that strip searches had to be "'rationally related to legitimate government purposes.'" *Id.* at 100 (quoting *Iqbal* v. *Hasty*, 490 F.3d at 172). I cannot join in this reasoning.

*First*, insofar as plaintiffs challenge the frequency of the strip searches, it is their burden to plead facts sufficient to demonstrate that the challenged policy lacked a rational relationship to a legitimate government objective, specifically, prison security. See *Turner* v. *Safley*, 482 U.S. at 89 (establishing standard for challenging prison regulation); *Covino* v. *Patrissi*, 967 F.2d at 78-80 (applying standard to body-cavity search challenge). That burden is, moreover, a heavy one because it requires a showing that the "logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner* v. *Safley*, 482 U.S. at 89-90. I do not think plaintiffs' pleadings plausibly allege that the frequency with which they were strip searched was so unrelated to prison security as to be arbitrary or irrational.

Plaintiffs assert that they were strip searched "even when they had no conceivable opportunity to obtain contraband." Compl. ¶112. The conclusion borrows from *Hodges* v. *Stanley*, a case in which this court reinstated a complaint challenging a second strip search under circumstances where "it seems clear that there was no possibility that Hodges could have obtained and concealed contraband." 712 F.2d 34, 35 (2d Cir. 1983). *Hodges*, however, was decided before *Turner* and *Covino*. Thus,

courts cannot assume that its "no possibility" to obtain contraband conclusion invariably equates to the required showing of no rational relationship to a legitimate government purpose. Notably, *Hodges* reached the "no possibility" conclusion in circumstances where the prisoner had been searched "*immediately* prior to the search forming the basis of his complaint." *Id.* at 35 (emphasis added). Plaintiffs here allege no such immediately successive—and, therefore, purposeless—strip searches. Rather, they complain of random strip searches in their cells or of required strip searches in circumstances involving intervening events—*e.g.*, before and after non-contact visits—that *plaintiffs* conclusorily maintain afforded them no opportunity to receive contraband. See Compl. ¶112. In the aftermath, however, of an all-too-successful attack on a BOP guard by a restrictively confined terrorist suspect, see *United States* v. *Salim*, 690 F.3d at 119-20, it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another to ensure prison security. *Hodges* cannot be read to make clear to every reasonable officer that such searches were unconstitutional. Indeed, this is precisely the sort of "difficult judgment[ ] concerning institutional operations" that the Supreme Court has concluded must be made by "prison administrators . . . , and not the courts." *Turner* v. *Safley*, 482 U.S. at 89 (internal quotation marks omitted).[17]

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[17] The majority's reliance on *Iqbal* v. *Hasty*, 490 F.3d at 172, in holding otherwise, see Majority Op., *ante* at 98, is misplaced for the reasons already discussed. See *supra* at 61-62.

So too is its citation to *N.G.* v. *Connecticut*, 382 F.3d 225 (2d Cir. 2004). See Majority Op., *ante* at 98 n.44. There, this court held that

*Second*, with respect to the manner in which the searches were conducted, plaintiffs' claims against Hasty and Sherman depend on these defendants' review of a visual search log allegedly created by MDC staff for management. The "possibility" that defendants reviewed such logs is not enough, however, to state a plausible claim against them for the manner of the searches. *Ashcroft* v. *Iqbal*, 556 U.S. at 678 (stating that "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully"). Indeed, even if their review of the logs were plausible, it would, at best, support an inference of Hasty's and Sherman's knowledge of the manner in which the searches were being conducted. Further facts indicating more than negligence in these defendants' failure to take corrective action would be necessary plausibly to plead that through their "own individual actions," each had "violated the Constitution." *Id.* at 676; see also, *e.g.*, *O'Neill* v. *Krzeminski*, 839 F.2d

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repetitive strip searches after supervisory transport of persons confined in *juvenile* facilities were not reasonable under the Fourth Amendment in the absence of reason to suspect the juvenile's possession of contraband. See *N.G.* v. *Connecticut*, 382 F.3d at 233-34. It is hardly apparent that the same conclusion applies where the persons being searched are adults and where they are being confined subject to clearance of terrorist activities. The higher risks to prison and public safety of missed contraband in that circumstance, as well as terrorists' proved ability to evade even restrictive confinement does not admit a conclusion that *N.G.* clearly established unreasonableness in the context here at issue. See generally *id.* at 234 (acknowledging that continuous custody cannot "guarantee" protection for subsequent access to contraband).

Even if such a conclusion were possible, however, *N.G.* was not decided until *2004*. Thus, the majority can hardly rely on that decision as the clearly established law that, in late *2001*, put beyond debate that the strip-search policy here at issue violated the Fourth Amendment.

9, 11 n.1 (2d Cir. 1988) ("Negligence is not a basis of liability for constitutional torts.").

I would thus grant Hasty and Sherman dismissal of the MDC Plaintiffs' Fourth Amendment claim on the ground of qualified immunity.

* * *

In sum, I respectfully dissent from the judgment entered on appeal in this case insofar as it allows the MDC Plaintiffs to pursue money damages on policy-challenging Fifth Amendment claims for punitive and discriminatory confinement against defendants Ashcroft, Mueller, Ziglar, Hasty, and Sherman, and an attendant policy-challenging Fourth Amendment claim for unreasonable strip searches against defendants Hasty and Sherman. I conclude that no established *Bivens* action is available for plaintiffs to pursue these claims and that significant factors counsel hesitation in extending *Bivens* to an action challenging executive policy pertaining to immigration and national security made in a time of crisis. In any event, I would grant defendants' motions for dismissal on grounds of qualified immunity because plaintiffs fail either to plead plausible constitutional violations or to demonstrate that clearly established law would have alerted every reasonable official that the challenged actions were unlawful.

**APPENDIX B**

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NEW YORK**

FOR PUBLICATION

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No. 02-CV-2307

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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA RAJ BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs,*

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY, SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN, JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

*Defendants.*

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MEMORANDUM
AND ORDER

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JOHN GLEESON, United States District Judge:

Plaintiffs Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya bring this putative class action against John Ashcroft, Robert Mueller, James Ziglar, Dennis Hasty, Michael Zenk, James Sherman, Salvatore Lopresti, and Joseph Cuciti. Plaintiffs were arrested and detained by federal authorities in connection with the investigation of the terrorist attacks of September 11, 2011. They bring six *Bivens* claims and a seventh claim under 42 U.S.C. § 1985, all arising out of their allegations of discriminatory and punitive detention. The defendants have now moved to dismiss. For the reasons set forth below, the defendants' motions are granted in part and denied in part.

Specifically, the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two and Six) shall proceed against Hasty, Zenk, Sherman, Lopresti, and Cuciti. To the extent they are alleged against Ashcroft, Mueller and Ziglar,[1] the allegations are insufficient and the claims are therefore dismissed as against them. As for the claimed deprivation of the plaintiffs' free exercise rights (Claim Three), I hold that the *Bivens* damages remedy is extended to this context and that the claim shall proceed against Hasty, Zenk, Sherman, Lopresti, and Cuciti. It is insufficiently pled against Ashcroft, Mueller and Ziglar and is therefore dismissed as against them. The claims based on the

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[1] These three defendants are not named as defendants in Claim Six, which focuses specifically on strip searches.

alleged communications blackout and interference with counsel (Claims Four and Five) are dismissed as to all defendants on the ground of qualified immunity. Finally, the conspiracy claim (Claim Seven) shall proceed, but only to the extent that the underlying objects of the conspiracy (Claims One through Six) have survived the motion. Thus, it is dismissed as against Ashcroft, Mueller and Ziglar and shall proceed to the extent it alleges a conspiracy by the remaining defendants to commit the civil rights violations alleged in Claims One, Two, Three and Six.

In sum, the case against Ashcroft, Mueller and Ziglar is dismissed in its entirety. Only Claims Four and Five (and the part of Claim Seven that alleges a conspiracy to commit the wrongs charged in Claims Four and Five) are dismissed as against the other defendants. Counsel for the remaining parties are directed to appear before Chief Magistrate Gold for a status conference on January 30, 2013 at 2:00 PM.

## BACKGROUND

### A. Factual Allegations

#### 1. *Overview*

The plaintiffs are eight male, non-United States citizens who were arrested on immigration charges following the terrorist attacks on September 11, 2001 ("9/11 attacks"). They were held in immigration custody for periods ranging from three to eight months after receiving final orders of removal or grants of voluntary departure. All but two are Muslims of Middle Eastern, North African, or South Asian origin; the others, natives of India and Nepal, are Hindu. Plaintiffs bring this putative class action on behalf of themselves and a class of male non-

citizens who are Arab or Muslim, or were perceived by the defendants to be Arab or Muslim,[2] and were (1) arrested by the Immigration and Naturalization Service ("INS") or the Federal Bureau of Investigation ("FBI") after September 11, 2001, and charged with immigration violations; (2) treated as "of interest" to the government's terrorism investigation; (3) detained under a blanket "hold-until-cleared" policy, pursuant to which they were held without bond until cleared of terrorist ties by the FBI; and (4) confined in the Metropolitan Detention Center ("MDC") or the Passaic County Jail ("Passaic Jail"). I refer to the putative class as the "Detainees."

2. *The Treatment of the Detainees*[3]

In the aftermath of the 9/11 attacks, the defendants acted together to create and implement a series of policies and practices relating to the identification, detention, and treatment of Arab and Muslim noncitizens who had violated immigration laws (*i.e.*, the Detainees). I refer to this series of policies and practices in the aggregate as the "detention policy." Pursuant to the detention policy, the Detainees were rounded up and detained on their immigration violations so government officials could question them in connection with the ongoing investigation of the 9/11 attacks (the "PENTTBOM investigation"); they were treated as "of interest" to the

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[2] Hereinafter, mention of Arab and/or Muslim individuals includes individuals who were perceived by the defendants to be Arab and/or Muslim.

[3] The factual allegations set forth herein are drawn from the Complaint and two incorporated reports by the Office of the Inspector General to the extent those reports are not contradicted by the allegations of the Complaint. ¶3 n.1. All citations in this opinion preceded by "¶" or "¶¶" refer to paragraphs of the Complaint.

PENTTBOM investigation, which meant that they were deemed to be potential terrorists despite the fact that they had been arrested based on immigration violations, not on suspicion of terrorist activity; they were subject to a hold-until-cleared policy, under which they were held for lengthy periods of times—often for months after they were ordered removed from the country—until the FBI affirmatively cleared them of suspicion of wrongdoing; and they were held until their release in extremely restrictive conditions of confinement. The only aspect of the detention policy challenged in the Complaint is the confinement of the Detainees in harsh conditions ("harsh confinement policy").

The harsh confinement policy, which was created by the DOJ defendants, was a directive to hold the Detainees in restrictive conditions under which they would feel maximum pressure to cooperate with the PENTTBOM investigation. Although this policy mandated that the Detainees' ability to contact the outside world be limited, it did not specify the precise conditions in which they would be held. Rather, the harsh confinement policy was a general mandate, and the exact manner of its implementation was to be determined by officials at the facilities in which the Detainees were held.[4]

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[4] Plaintiffs allege that Ashcroft and Mueller "mapped out ways to exert maximum pressure" on the Detainees, and that Ashcroft "created many of the unreasonable and excessively harsh conditions" under which the Detainees were held. ¶21. These allegations imply that the harsh confinement policy mandated some of the specific conditions that the Detainees endured at the MDC, but the plaintiffs have never specified what those particular conditions were. Moreover, as discussed more fully below, the plaintiffs concede that the specific conditions in which the Detainees were held were created by the MDC defendants in implementing the harsh confinement policy.

The harsh confinement policy was expressly directed at Arab and Muslim noncitizens who had violated immigration laws: It mandated restrictive conditions specifically for Arab and Muslim individuals. In other words, it was discriminatory on its face. This is not to say that no non-Arabs and non-Muslims were held in harsh conditions of confinement as a result of the investigation following the 9/11 attacks. Other individuals may have been held in such conditions pursuant to other policies or for other reasons. However, the harsh confinement policy expressly applied to Arab and Muslim individuals, dictating that those detained under the policy be held in harsh conditions of confinement—not because of any suspected links to terrorism, but because of their race, national origin, and/or religion.

The harsh confinement policy was implemented by the MDC defendants in the following way: The Detainees (the "MDC Detainees") were placed in that facility's Administrative Maximum Special Housing Unit (the "ADMAX SHU"). There, they were confined in tiny cells for over 23 hours a day, provided with meager and barely edible food, and prohibited from moving around the unit, using the telephone freely, using the commissary, accessing MDC handbooks (which explained how to file complaints about mistreatment), and keeping any property, including personal hygiene items like toilet paper and soap, in their cells. Whenever they left their cells, they

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See ¶ 65 ("The punitive conditions in which MDC Plaintiffs and class members were placed were the *direct result* of the strategy mapped out by Ashcroft and Mueller's small working group.") (emphasis added); Pls.' Opp. Mot. to Dismiss 3, ECF No. 749 ("[I]t does not appear that Ashcroft's small group personally designed the details of every restrictive condition . . . .").

were handcuffed and shackled. Although they were offered the nominal opportunity to visit the recreation area outside of their cells several times a week, the recreation area was exposed to the elements and the MDC Detainees were not offered clothing beyond their standard cotton prison garb and a light jacket. Furthermore, detainees who accepted such offers were often physically abused along the way, and were sometimes left for hours in the cold recreation cell, over their protests, as a form of punishment. As a result, they were constructively denied exercise during the fall and winter.

The MDC Detainees also were denied sleep. Bright lights were kept on in the ADMAX SHU for 24 hours a day (until March 2002), and staff at the MDC made a practice of banging on the MDC Detainees' cell doors and engaging in other conduct designed to keep them from sleeping. They also conducted inmate "counts" at midnight, 3:00 a.m., and 5:00 a.m. While such counts are inherently disruptive—officers are required to see the skin of each inmate being counted, see BOP P.S. 5500.09—the officers "went beyond what was required for the count by kicking the door hard with their boots, knocking on the door at night much more frequently than required, and making negative comments when knocking on the door." ¶39. For example, for the first two or three weeks that one detainee was in the ADMAX SHU, one of the officers walked by about every 15 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." ¶36. In addition, officers used the in-cell camera to watch one detainee, and when he would appear to fall asleep they would kick the cell door.

The MDC Detainees also were subjected to frequent physical and verbal abuse by many of the officers in the

ADMAX SHU. The physical abuse included slamming the MDC Detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. The use of such force was unnecessary because the MDC Detainees were always fully compliant with orders and rarely engaged in misconduct. The verbal abuse included referring to the MDC Detainees as "terrorists" and other offensive names, threatening them with violence, cursing at them, insulting their religion, and making humiliating sexual comments during strip-searches.

Both the MDC Detainees and the Detainees held at the Passaic Jail (the "Passaic Detainees") were subjected to unreasonable and punitive strip-searches. The MDC Detainees were strip-searched every time they were removed from or returned to their cells, including before and after visiting with their attorneys, receiving medical care, using the recreation area, attending a court hearing, and being transferred to another cell. They were strip-searched upon each arrival at the MDC in the receiving and discharge area and again after they had been escorted—shackled and under continuous guard—to the ADMAX SHU. These strip-searches occurred even when they had no conceivable opportunity to obtain contraband, such as before and after non-contact attorney visits (to and from which they were escorted—handcuffed and shackled—by a four-man guard). Supp. OIG Rep. at 3. The MDC had no written policy governing when to conduct strip-searches, and they were conducted inconsistently.

The strip-searches were unnecessary to security within the MDC. Rather, they were conducted to punish and humiliate the detainees. Female officers were often present during the strip-searches; the strip-searches were regularly videotaped in their entirety (contrary to BOP policy, see BOP P.S. 5521.05); and MDC officers routinely laughed and made inappropriate sexual comments during the strip-searches.

Officers at the MDC and the Passaic Jail also interfered with the Detainees' ability to practice and observe their Muslim faith. Specifically, when the Detainees requested copies of the Koran, officers delayed for weeks or months before providing them; the MDC and the Passaic Jail failed to provide food that conformed to the Halal diet, despite the Detainees' requests for such food; the MDC had no clock visible to the MDC Detainees, and officers regularly refused to tell them the time of day or the date so they could conform to daily Islam prayer requirements and observe Ramadan; and officers constantly interrupted the Detainees' prayers by banging on their cell doors, yelling and making noise, screaming derogatory anti-Muslim comments, videotaping them, handing out hygiene supplies, and/or telling them to "shut the fuck up" while they were trying to pray.

In addition, most of the MDC Detainees were held incommunicado during the first weeks of their detention (the "communications blackout"). MDC staff repeatedly turned away everyone, including lawyers and relatives, who came to the MDC looking for the MDC Detainees, and thus the MDC Detainees had neither legal nor social visits during this period. This communications blackout lasted until mid-October 2011.

After the initial communications blackout, the MDC Detainees were nominally permitted one call per week to

an attorney. However, MDC officers obstructed Detainees' efforts to telephone and retain lawyers in multiple ways. They were denied sufficient information to obtain legal counsel; although they were given a list of organizations that provide free legal services, the contact information for these organizations was outdated and inaccurate. Legal calls that resulted in a wrong number or busy signal were counted against their quota of calls, as were calls answered by voicemail. Officers frequently asked the MDC Detainees, "Are you okay?," and if the MDC Detainees responded affirmatively, the officers construed this as a waiver of their already-limited privilege to make legal calls. The officers also often brought the phone to the MDC Detainees early in the morning before law offices opened for the day. And they frequently pretended to dial a requested number or deliberately dialed a wrong number and then claimed the line was dead or busy. They then refused to dial again, saying that the Detainee had exhausted his quota.

When the MDC Detainees managed to reach their attorneys by phone, the officers frequently stood within hearing distance of conversations that should have been treated as privileged. Legal visits were non-contact and the MDC Detainees were handcuffed and shackled during the entirety of the visits. The MDC video- and audio-recorded the MDC Detainees' legal visits until April 2002 or later.

The MDC Detainees were nominally permitted one social call per month after the initial communications blackout. However, these calls were just as severely restricted as the legal calls. Social visits were restricted to immediate family, yet even immediate family members were sometimes turned away. As with their legal visits, social visits were non-contact and the MDC Detainees

were handcuffed and shackled during the entirety of the visits.

3. *The Plaintiffs*

a. *Ahmer Iqbal Abbasi*

Abbasi, a citizen of Pakistan and a devout Muslim, entered the United States in 1993 on a visitor visa. He applied unsuccessfully for political asylum, and he remained in the United States illegally after his application was denied. He initially worked as a taxicab driver in Manhattan, saving enough money to purchase a small grocery store, which he sold sometime before 2001.

Abbasi was arrested by the FBI on September 25, 2001. He was interviewed by officials from the FBI, INS, and the New York Police Department ("NYPD"), who gave him no information regarding why he was being detained. The officials asked, among other things, about Abbasi's religious beliefs and practices. Abbasi later learned that his arrest had resulted from a report that a "male[,] possibly Arab" (apparently Abbasi's houseguest) had presented a false Social Security card at the New Jersey Department of Motor Vehicles and had given Abbasi's address as his own. Abbasi was detained in the ADMAX SHU at the MDC.

b. *Anser Mehmood*

Mehmood, a citizen of Pakistan and a devout Muslim, entered the United States in 1989 with his wife, Uzma (Abbasi's sister), and their three children. Mehmood entered on a business visa but remained illegally after the visa expired. He started a trucking business in the United States, making enough money to purchase a home and to send funds to his extended family in Pakistan. Mehmood and his family settled in Bayonne, New Jersey. Another child, an American citizen by birth, was born in

2000. All four of the children attended public school in New Jersey. In May 2001, another of Uzma's brothers, who is an American citizen, submitted an immigration petition for Mehmood and his family. On October 3, 2001, a team of FBI and INS agents visited Mehmood and his wife in their home based on the same report that led to Abbasi's arrest. The agents interviewed Mehmood and his wife about their immigration status, showed them images of people they did not recognize, and asked whether they were involved in jihad. The agents, who sought information on another of Uzma's brothers, who was living in Pakistan, told Mehmood that they needed to arrest either Mehmood or his wife. They arrested Mehmood at his request. Mehmood was detained in the ADMAX SHU at the MDC.

c. *Benamar Benatta*

Benatta, an Algerian citizen and member of the Algerian Air Force, entered the United States on a visitor visa on December 31, 2000. He was granted entry in order to study aviation at Northrop Grumman, but he remained in the United States after the expiration of his visa with the goal of seeking political asylum and gaining employment. On September 5, 2001, six days before the terrorist attacks, he crossed the Canadian border using false documentation with the intent to apply for refugee status there, but was detained by Canadian authorities for investigation. On September 12, he was transported back to the United States and turned over to the INS's custody.

At the Rainbow Bridge border control post in Niagara Falls, New York, Benatta was interrogated by the FBI regarding his false documentation. A report of the interrogation was disseminated, and the INS subsequently commenced removal proceedings. Benatta was served

with a Notice to Appear at immigration court in Batavia, New York, but on September 16, 2001, before the proceeding occurred and before Benatta was able to retain counsel, he was transferred to the ADMAX SHU at the MDC.

d. *Ahmed Khalifa*

Khalifa, a medical student from Egypt, was in the United States for three months on a student visa and had a return ticket to Egypt for October 15, 2001. On September 30, 2001, the apartment he shared with several other Egyptian friends was raided by FBI, NYPD, and INS agents on a tip that several Arabs living at Khalifa's address were renting out a post office box and possibly sending out large quantities of money. The agents initially did not seem interested in Khalifa, although they asked him about his roommates, searched his wallet, and asked if he had had anything to do with the recent terrorist attacks. The agents subsequently determined that they wanted to hold Khalifa as well, and an FBI agent asked an INS agent to arrest Khalifa for working while in the United States on his student visa. Khalifa was detained in the ADMAX SHU at the MDC.

e. *Purna Raj Bajracharya*

Bajracharya, a citizen of Nepal, entered the United States in 1996 on a three-month visa. For the next five years he remained in Queens illegally, working at various odd jobs and sending money to his wife and sons in Nepal. Bajracharya intended to return to Nepal in the fall or winter 2001, and he began videotaping certain New York streets to show his family. An employee of the Queens County District Attorney's Office reported to the FBI on October 25, 2001 that an "Arab male" was videotaping a building that contained the District Attorney's

office and an FBI branch office. District Attorney staff promptly detained and searched him.

During Bajracharya's initial detention and interrogation, which lasted for five hours, FBI and INS agents requested that he bring them to his apartment. He did so, and showed the agents his passport and various identification documents. He admitted that he had overstayed his visa and was illegally present in the United States, and the INS then arrested him. He was detained in the ADMAX SHU at the MDC.

f. *Ibrahim Turkmen*

Turkmen, a Muslim Imam, is a citizen of Turkey. He came to the United States on October 4, 2000 on a six-month tourist visa to visit a friend from Turkey who lived on Long Island. Shortly after his arrival, Turkmen found work at a service station in Bellport, New York. He worked there until January 2001, when he took a job at another service station in the same town. In April 2001, he left that job and began to work part-time for a local Turkish construction company. He spoke regularly to his wife and four daughters, who remained in Turkey, and sent money to support them on a weekly basis.

Turkmen spoke virtually no English when he first arrived in the United States. During his stay, he learned only the words necessary for his limited daily interaction with English-speakers. At the time that he was taken into custody, Turkmen understood very little spoken English, and he could not read English at all.

On October 13, 2001, two FBI agents visited Turkmen at the West Babylon, New York apartment where he was staying with several Turkish friends. The visit was based on a tip from the friends' landlady, who reported to an FBI hotline that she had rented her apartment to several

Middle Eastern men and that she "would feel awful if her tenants were involved in terrorism and [she] didn't call." ¶251. The agents asked Turkmen whether he had any involvement in the 9/11 attacks and whether he had any association with terrorists. They also inquired as to his immigration status. Turkmen had difficulty understanding the questions posed to him in English by the FBI, and no interpreter was provided. Turkmen denied any involvement with terrorists or terrorist activity. The FBI agents accused Turkmen of being an associate of Osama bin Laden and placed him under arrest. He was held at the Passaic Jail.

g. *Akhil Sachdeva*

Sachdeva is a citizen of India and is Hindu. He holds a Bachelor of Arts degree in commerce from the University of Delhi. Since 1995, he has entered the United States for extended periods of time. In December 1998, Sachdeva legally immigrated to Canada. In 1998 he married a woman who owned a gas station in Port Washington, New York. He then briefly returned to Canada until sometime in September or October of 2001, when he returned to the United States to finalize his divorce.

Sometime in late November 2001, an FBI agent visited his ex-wife's gas station looking for a Muslim employee who had been overheard having a conversation in mixed Arabic and English relating to flight simulators and flying. Failing to locate the employee, the agent left a note requesting that Sachdeva's ex-wife contact him. She passed on the request to Sachdeva, who called the agent in early December 2001. The FBI agent asked Sachdeva to come to the agent's offices for an interview, and Sachdeva complied on December 9, 2001. At the interview, two FBI agents questioned Sachdeva about the 9/11 attacks and his religious beliefs and examined his

personal identification. They permitted him to leave, but on December 20, 2001, INS agents arrested Sachdeva at his uncle's apartment. He was detained at the Passaic Jail.

4. *The Claims Alleged*

The Complaint sets forth seven claims for relief. Those claims, which plaintiffs assert on their own behalf and, in most instances, on behalf of the putative class, are: (1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that defendants singled out plaintiffs for harsh conditions of confinement because of their race, religion and/or ethnic or national origin; (3) a claim under the Free Exercise Clause; (4) a free speech and free association claim under the First Amendment; (5) a due process claim alleging interference with access to counsel; (6) a claim under the Fourth and Fifth Amendments for unreasonable and punitive searches; and (7) a claim alleging a conspiracy among the defendants to commit the civil rights violations described in the first six claims, in violation of 42 U.S.C. § 1985.

**B. Procedural History**

The original complaint in this case was filed on April 17, 2002. The First Amended Complaint was filed on July 27, 2002. The government moved to dismiss on behalf of all named defendants on August 26, 2002, and oral argument on the motion was held on December 19, 2002. On June 2, 2003, the Office of the Inspector General of the United States Department of Justice released a 198-page report entitled "A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (the "OIG Report"). In light of the OIG Report, the plaintiffs sought leave to amend their complaint,

which I granted. Around that time, the government withdrew from representing the named defendants in their individual capacities, and substitute counsel filed notices of appearance.

On June 18, 2003, the plaintiffs filed the Second Amended Complaint, attaching the April 2003 OIG Report. Supplemental briefs in support of and opposing the motions to dismiss were filed. Then, in December 2003, the OIG filed another report—its 47-page "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (the "Supplemental OIG Report"; the two OIG reports are referred to collectively as the "OIG Reports"). On September 7, 2004, plaintiffs requested leave to file a Third Amended Complaint, which I granted. The Third Amended Complaint was filed on September 13, 2004. It raised thirty-one claims for relief that, broadly speaking, fell into two categories. The first category of claims stemmed from plaintiffs' contention that the government used plaintiffs' status as noncitizens who had violated immigration laws as an excuse to hold them in jail while it pursued its real interest: determining whether they were terrorists or could help catch terrorists. The second category of claims challenged the conditions of confinement in which the plaintiffs were held.

On June 14, 2006, after another round of briefing, I issued a memorandum and order granting in part and denying in part the motions to dismiss.[5] *Turkmen* v.

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[5] At a hearing on October 21, 2004, I ordered that discovery could begin on claims involving the conditions of confinement and the use of excessive force. The MDC Defendants moved to dismiss those claims as against them, arguing that they were entitled to qualified immunity. That motion was denied by order dated December 3,

*Ashcroft*, No. 02 Civ. 2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006) ("*Turkmen I*"). I dismissed the entire first category of claims and let the majority of claims in the second category proceed. Remaining after the motions to dismiss were: (1) the claim that the plaintiffs held in the MDC were subject to punitive conditions of confinement in contravention of their substantive due process rights; (2) the claim that the plaintiffs held in the MDC were unreasonably strip-searched in violation of the Fourth and Fifth Amendments; (3) the claim that defendants interfered with plaintiffs' religious practices in violation of the Free Exercise Clause; (4) the claim that defendants violated plaintiffs' due process rights by assigning them to the ADMAX SHU without process of any sort; (5) the claim that the defendants singled out the plaintiffs for harsh treatment in detention because of their race, religion and/or ethnic or national origin in violation of the Equal Protection Clause; (6) the Due Process and conversion claims arising from defendants' confiscation of several plaintiffs' personal property; (7) the claim that defendants imposed a communications blackout during plaintiffs' detention in violation of plaintiffs' First Amendment and due process rights; and (8) several Federal Tort Claims Act claims and excessive force claims not relevant here.[6]

The Second Circuit ruled on the appeal of *Turkmen I* in *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009)

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2004, see ECF No. 149, and a motion for reconsideration and vacatur of the December 3, 2004 order was denied on January 14, 2005. Familiarity with that order is presumed. Insofar as the issues addressed in that order are affected by the Supreme Court's decision in *Iqbal*, 556 U.S. at 662, I reconsider them here.

[6] Familiarity with *Turkmen I* and its underlying facts is presumed.

("*Turkmen II*"). In the period between *Turkmen I* and *Turkmen II*, the Supreme Court issued its decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). *Iqbal* dramatically altered the legal landscape in two ways relevant to my decision in *Turkmen I*. First, it revolutionized federal pleading standards, discarding the traditional "no set of facts" standard established by *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), and adopting a new "plausibility" standard. *Iqbal*, 556 U.S. at 678-80. In addition, it eliminated the doctrine of supervisory liability for *Bivens* claims. *Id.* at 676-77. Accordingly, the Second Circuit vacated my rulings denying the motions to dismiss the conditions of confinement claims, which had applied the outdated pleading standard, and remanded the case for reconsideration of those claims. *Turkmen II*, 589 F.3d at 547.[7]

On remand after *Turkmen II*, plaintiffs sought leave to amend, which I granted on August 26, 2010. The instant complaint, entitled the Fourth Amended Complaint (the "Complaint"), was filed on September 13, 2010. The Complaint includes six claims that were originally raised in *Turkmen I* and a new claim never before raised. All defendants have moved to dismiss.

## DISCUSSION

### A. The Applicable Legal Principles

#### 1. *The Motion to Dismiss Standard*

The pleading landscape has changed substantially since this case was first before me. Instead of holding the Complaint to the standard set by *Conley*, 355 U.S. at 45-46 (1957), under which a claim could not be dismissed

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[7] The Second Circuit also addressed plaintiffs' challenge to my dismissal of several other claims, and it affirmed the dismissal of those claims.

unless the court concluded that there was no set of facts on which the plaintiff would be entitled to relief, following *Iqbal*, 556 U.S. at 678-80, I must now decide whether the plaintiffs' allegations, if true, state a claim that is plausible on its face. A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Although the plausibility standard does not require plaintiffs to show that their desired inferences are more likely than not the correct inferences to draw, the facts alleged must establish "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that "pleads facts that are 'merely consistent with' a defendant's . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atl.* v. *Twombly*, 550 U.S. 544, 557 (2007)).

Although in considering a motion to dismiss I am required to accept as true the factual assertions in a complaint, see *Zinermon* v. *Burch*, 494 U.S. 113, 118 (1990), I am "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Thus, I begin my analysis of the facial plausibility of the asserted claims by identifying, and casting aside, "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. I then consider only the well-pleaded factual allegations in the complaint, and assuming their truth, determine whether they plausibly suggest the plaintiffs' entitlement to relief. See *id.* at 681.

2. *Supervisory Liability After* Iqbal

Prior to the Supreme Court's decision in *Iqbal*, an official could be held liable for a constitutional tort under a

theory of "direct liability" as well as "supervisory liability." Direct liability is liability for "caus[ing] an injury while possessing the mens rea required [for a] particular constitutional [tort]." Comment, *Supervisory Liability After* Iqbal: *Decoupling* Bivens *from Section 1983*, 77 U. Chi. L. Rev. 1401, 1408 (2010). In other words, an individual becomes directly liable for a constitutional tort (he becomes a "primary actor") when he acts in a way that satisfies each of the elements of that tort. For example, a defendant is directly liable for an equal protection violation if he (1) injures a plaintiff (causation) (2) because of discriminatory animus (mens rea). And if a defendant's (1) deliberately indifferent failure to act in the face of a known risk to an inmate's safety (mens rea) (2) causes injury to that inmate (causation), the defendant will be liable for an Eighth Amendment violation. As is evident, the elements that must be satisfied for a defendant to be held directly liable for a tort depend on the tort alleged.

In contrast, supervisory liability is incurred when a supervisory defendant (a "secondary actor") is in some way "personally involved" with a primary actor's constitutional tort and is a cause of the plaintiff's injury. In the Second Circuit, personal involvement is understood broadly. A government official is personally involved in a constitutional tort if he: (1) participated directly in the alleged violation; (2) failed to remedy the violation after being informed of the violation through a report or appeal; (3) created a policy or custom, or allowed the continuance of such a policy or custom, under which unconstitutional practice occurred; (4) was grossly negligent in supervising a subordinate who committed the unlawful act; or (5) exhibited deliberate indifference to an individual's constitutional rights by failing to act on information indicating the unconstitutional act was occurring. *Colon*

v. *Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (citing *Wright* v. *Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

For supervisory liability to exist, the secondary actor's behavior need not satisfy each of the elements of the constitutional tort. Rather, as long as a primary actor committed a constitutional tort and the secondary actor was personally involved in that tort (in any of the five ways set forth in *Colon*) and was a cause of the plaintiff's injury, the secondary actor may be held liable. The elements necessary to incur supervisory liability do not vary with the constitutional tort alleged. Thus, the conduct of a secondary actor sued for supervisory liability will be judged under the same standard for personal involvement, regardless of whether the primary actor's tort arises under the Equal Protection Clause or the Fourth Amendment.

Supervisory liability, therefore, extends liability to persons who cannot be held directly liable. While direct liability exists only when all the elements of the tort in question have been established, supervisory liability can operate to relax a mens rea element, allowing liability against a supervisory defendant who does not satisfy that element of the tort. For example, a supervisor who lacked discriminatory intent can never be held directly liable for an equal protection violation, but if he "was grossly negligent in supervising a subordinate" who committed an equal protection violation, he may be held liable on a theory of supervisory liability. Rather than act with the intent to discriminate, the supervisory defendant need only have been negligent in the discharge of his supervisory responsibilities.

Supervisory liability does not, however, relax all of the elements of a constitutional tort. One common element of any recognized constitutional tort is that the defendant

caused the plaintiff's injury. Supervisory liability does not dispense with the need to show an affirmative causal link between the supervisor's actions (or inactions) and the injury. See, *e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 140 (2d Cir. 2002) (holding that §1983's causation requirement applies when invoking supervisory liability); *Iqbal*, 556 U.S. at 675 ("In the limited settings where *Bivens* does apply, the implied cause of action is the 'federal analog to suits brought against state officials under [§1983].'") (quoting *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006)). In other words, regardless of whether a defendant is sued under a theory of direct or supervisory liability, he must have caused the plaintiff's injury.

In *Iqbal*, the Supreme Court, in no uncertain terms, eliminated supervisory liability in *Bivens* claims. *Iqbal*, 556 U.S. at 676-77. According to the Court, "where masters do not answer for the torts of their servants[,] the term 'supervisory liability' is a misnomer." *Id.* at 677. Thus, after *Iqbal*, in order for a plaintiff to assert a valid *Bivens* claim against a government official, he "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. In other words, only direct liability remains for *Bivens* claims.

This is not to say that supervisors are now immune from *Bivens* actions. A supervisor, just as any defendant, can be held directly liable for a constitutional tort if his actions satisfy the elements of that tort. However, if a supervisor cannot be held directly liable for a constitutional tort, that is, if his conduct has not satisfied the elements of that tort, the doctrine of supervisory liability is now unavailable to relax those elements.

Nor does the elimination of supervisory liability spell the end of *Bivens* liability premised upon a defendant's

inaction if such inaction satisfies the elements of a tort. As *Colon* makes clear, nonfeasance—just like malfeasance—*can* be a basis for liability, and nothing in *Iqbal* changed this rule. *D'Olimpio* v. *Crisafi*, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) ("*Colon*'s bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that 'personal involvement of defendants in alleged constitutional deprivations' can be shown by nonfeasance as well as misfeasance.'" (quoting *Colon*, 58 F.3d at 873)); see, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (premising liability upon failure to protect from privately inflicted harms); cf. *City of Okla. City* v. *Tuttle*, 471 U.S. 808 (1985) (premising §1983 liability of municipality upon failure to train its employees).

The defendants argue that, of the five forms of personal involvement described by *Colon*, only the first and the first half of the third survive *Iqbal*. The Second Circuit has never addressed this precise issue, and the district courts in this Circuit, as well as the other courts of appeals, have grappled with this question and reached conflicting results. Compare *Bellamy* v. *Mount Vernon Hosp.*, No. 07 Civ. 1801, 2009 WL 1835939, at *5-6 (S.D.N.Y. June 26, 2009) (dismissing deliberate indifference claim against a supervisor, holding that *Iqbal* abrogated categories of supervisory liability that do not involve "active conduct"), with *D'Olimpio*, 718 F. Supp. 2d at 347 (holding that each of the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the elements of particular constitutional tort alleged); see also *Starr* v. *Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) superseding, 633 F.3d 1191 (9th Cir. 2011), rehearing en banc denied, 659 F.3d 850 (9th Cir. 2011) (holding that plaintiff may state a claim against a supervisor for deliberate indifference based upon the

supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates);[8] *Argueta* v. *U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 72 (3d Cir. 2011) (assuming, without holding, that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying unconstitutional conduct); *Santiago* v. *Warminster Tp.*, 629 F.3d 121, 130 n.8 (3d Cir. 2010) (noting that *Iqbal* may restrict the incidents in which a "failure to supervise" will result in liability, but refraining from deciding the question); *Dodds* v. *Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (holding a defendant-supervisor can be held liable if he "creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy" that causes a constitutional tort).

I don't find this debate over what "remains" of the *Colon* standards for personal involvement after *Iqbal* to be useful. *Iqbal* removed supervisory liability from *Bivens* claims. This means that liability can no longer be shown by alleging *simply* personal involvement under *Colon* (and causation of the plaintiff's injury) *regardless* of the kind of constitutional tort alleged. Direct liability is now the only option in *Bivens* claims—for supervisors and supervisees—and a plaintiff must now allege that the defendant's conduct satisfies each of the elements of the tort alleged. But the demise of supervisory liability in *Bivens* claims does not mean that the forms of personal

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[8] Dissenting from denial of rehearing en banc, Judge O'Scannlain, joined by seven judges, argued that the majority opinion "conflicts with *Iqbal* in . . . its far-reaching conclusions regarding supervisory liability." *Starr* v. *Cnty. of Los Angeles*, 659 F.3d 850, 855 (9th Cir. 2011).

involvement under *Colon* can never constitute a basis for *direct* liability. If a defendant's personal involvement under *Colon* satisfies the elements of a constitutional tort, that involvement may trigger liability.

For example, because the mens rea element of an Eighth Amendment violation is deliberate indifference, a supervisor—like any other defendant—can be held directly liable for deliberate indifference (the fifth form of personal involvement set forth in *Colon*), assuming his conduct meets the other elements of the tort. And, as *Iqbal* itself discussed, because the mens rea element of an equal protection claim is discriminatory intent, "purpose rather than knowledge is required to impose *Bivens* [direct] liability on [a] subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Iqbal*, 556 U.S. at 677. Accordingly, if a supervisor, for example, created a policy or custom directing unconstitutional conduct (the third form of personal involvement set forth in *Colon*) because of discriminatory animus, and that policy or custom caused plaintiff's injury, a supervisor may be held liable for that conduct. What is different after *Iqbal* is that the guiding question is no longer simply whether a plaintiff has pleaded personal involvement under *Colon* but whether a plaintiff has pleaded each of the elements of the constitutional tort alleged. The "factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue," *id.* at 676, and what "remains" of *Colon* depends on the constitutional provision at issue.

3. *The Qualified Immunity Standard*

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established stat-

utory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether a right was clearly established, courts look to whether (1) the right was defined with reasonable clarity; (2) Supreme Court or Second Circuit precedent has confirmed the existence of the right; and (3) a reasonable defendant would have understood from the existing law that his conduct was unlawful. *Young* v. *Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998). The determination of whether the right at issue was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), abrogated on other grounds by *Pearson* v. *Callahan*, 555 U.S. 223 (2009). An officer is entitled to qualified immunity even when his actions were unlawful provided the constitutionality of his conduct was objectively debatable. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987); *Taravella* v. *Town of Wolcott*, 599 F.3d 129, 135 (2d Cir. 2010) (holding that "consideration of whether it was 'objectively reasonable' for a defendant to believe his actions were lawful . . . is indispensable" to the qualified immunity analysis); *Danahy* v. *Buscaglia*, 134 F.3d 1185, 1190 (2d Cir. 1998) (stating that immunity applies whenever "officers of reasonable competence could disagree on the legality of defendant's actions") (internal quotation marks omitted). There was a time when the qualified immunity analysis had a prescribed order of operations: judges were directed to first decide whether the defendant's conduct (as alleged by the plaintiff) violated a constitutional right; and only if the answer to that question was "yes" could they proceed to determine whether the right was "clearly established" at the time of the violation. *Saucier*, 533 U.S. at 201 (emphasis added). However, following the Supreme Court's decision in *Pearson*,

555 U.S at 242, courts now have discretion to address those questions in reverse order, and to refrain from deciding the first if the asserted right was not clearly established. See *Doninger* v. *Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011).

### B. Claims One and Six: Conditions of Confinement

The MDC Detainees allege that the creation and the implementation of the harsh confinement policy violated their Fifth Amendment substantive due process rights. They assert Claim One against all defendants; Claim Six asserts a Fifth Amendment due process claim against only the MDC Defendants based on the strip searches.[9] Both are *Bivens* claims seeking damages.[10]

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[9] Although Claim Six focuses solely on the strip searches and does not name the DOJ Defendants, the factual allegations incorporated by reference into Claim One embrace the strip search allegations. I deem Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants.

[10] Although, as discussed more fully below in relation to the free exercise-based *Bivens* claim, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts'," *Arar* v. *Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009) (en banc) (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69 (2001)). The conditions-of-confinement claims do not present a new context. The Second Circuit has long assumed that mistreatment claims like those alleged here give rise to a *Bivens* claim. See *Arar*, 585 F.3d at 597 (Sack, J., dissenting) (citing cases). Moreover, as Judge Sack pointed out in dissent in *Arar*, when the Second Circuit reviewed essentially identical claims in *Iqbal*, it "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of the *Bivens* doctrine." *Id.* Indeed, even the en banc majority in *Arar*, which concluded that extraordinary rendition was a new context (into which the *Bivens* remedy would not be extended), acknowledged that

1. *The Elements of the Claim*

I consider plaintiffs' substantive due process claim under the standard applicable to pretrial detainees. See *Turkmen I*, 2006 WL 1662663, at *31-32, aff'd in part, vacated in part, remanded, 589 F.3d 542 (2d Cir. 2009). For pretrial detainees, such a claim is governed by the Due Process Clause of the Fifth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979). In an action challenging conditions or restrictions of pretrial detention he has *purposefully* imposed, a *Bivens* defendant may be held liable if (1) with the intent to punish (mens rea) (2) he engaged in conduct that caused the conditions or restrictions that injured the plaintiff (causation). *Id.* at 535; *Iqbal* v. *Hasty*, 490 F.3d 143, 169 (2d Cir. 2007), rev'd by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). If the plaintiff does not allege that the defendant verbally expressed an intent to punish, punitive intent may be inferred from the nature of the conditions or restraints allegedly imposed. Specifically, a court may consider "'whether an alternative purpose to which [the condition] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Wolfish*, 441 U.S. at 538 (quoting *Kennedy* v. *Men-*

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*Bivens* claims are already available for the harsh conditions of confinement alleged here. See *id.* at 580 ("In the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. The guard who beat a prisoner should not have beaten him; . . . and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes."). Moreover, in *Turkmen I*, I rejected defendants' arguments that a *Bivens* remedy should not be extended, and I see no reason to revisit that determination here. 2006 WL 1662663, at *29.

*doza-Martinez*, 372 U.S. 144, 168-169 (1963)). Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. In contrast, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.*

With respect to conditions of pretrial detention not alleged to be *purposefully* caused by the defendants, which I refer to as environmental conditions, a *Bivens* defendant may be held liable on a substantive due process claim if he (1) caused injury to the plaintiff through his (2) deliberate indifference to a substantial risk that the plaintiff would be deprived of a basic human need, such as food, clothing, shelter, medical care, sleep, and reasonable safety. See *Iqbal*, 490 F.3d at 169; *Caiozzo* v. *Koreman*, 581 F.3d 63, 69 (2d Cir. 2009); *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *DeShaney* v. *Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189, 200 (1989). A defendant who is deliberately indifferent to a risk must be subjectively aware of that risk. *Caiozzo*, 581 F.3d at 71.

2. *The Sufficiency of the Allegations*

The plaintiffs allege that the defendants violated their substantive due process rights. Specifically, they complain that the defendants caused them to be, *inter alia*, constructively denied the opportunity to exercise; denied sleep; repeatedly placed in handcuffs and shackles; deprived of hygienic implements, such as soap and toilet paper; subjected to extremely cold conditions; deprived of sufficient food; frequently verbally and physically

abused; and repeatedly strip-searched (collectively, the "challenged conditions").

The plaintiffs advance different theories of liability with respect to the DOJ defendants and the MDC defendants. They seek to hold the MDC defendants liable for creating, or being deliberately indifferent to, the challenged conditions. In contrast, they seek to hold the DOJ defendants liable for creating the harsh confinement policy, which directed that the Detainees be held in restrictive conditions such that they felt maximum pressure to cooperate with law enforcement. Although that policy did not expressly contemplate the specific challenged conditions, plaintiffs allege that it *caused* those conditions because the challenged conditions were created in the implementation of the harsh confinement policy.

Consistent with my ruling in *Turkmen I*, 2006 WL 1662663, at *32-33, the defendants do not contest that the purpose of the challenged conditions was to punish and/or that the challenged conditions presented a serious risk of depriving the Detainees of their basic human needs.[11] Instead, the defendants, citing different rationales, argue that they should not be held responsible for injuries caused by those conditions. In other words, at issue on these motions to dismiss is not whether *someone* may be held liable in a *Bivens* action for the challenged conditions; it is whether each defendant is a proper defendant in such an action.

a. *The DOJ Defendants*

Plaintiffs contend that the DOJ defendants should be held liable because (1) with the intent to punish the De-

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[11] Accordingly, I do not revisit the question of whether the challenged conditions evince an intent to punish.

tainees (2) they created the harsh confinement policy, which caused the challenged conditions that injured the Detainees. The DOJ defendants contend that, because the policy did not itself direct unconstitutional action, it cannot be the basis for imposing liability now that supervisory liability has been eliminated. In other words, these defendants argue that to hold them liable simply because their facially constitutional policy was unconstitutionally applied would be to hold them responsible not for their own acts but for the acts of their supervisees.

I agree that holding the DOJ defendants liable *solely* on the basis that the MDC defendants unconstitutionally applied their facially constitutional policy would be the equivalent of imposing *respondeat superior* liability—a form of supervisory liability discarded in *Iqbal*. Indeed, one could describe almost *any* act taken by the MDC defendants as having been caused by the DOJ defendants, and holding the latter responsible for the former's acts without more than but-for causation would make a master responsible for the acts of his servants. Cf. *City of Okla. City* v. *Tuttle*, 471 U.S. 808, 823 (1985) ("Obviously if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, [a city police officer] would never have killed [the plaintiff] if [the city] did not have a 'policy' of establishing a police force."); *Connick* v. *Thompson*, 131 S. Ct. 1350, 1365 (2011) (finding that a "stringent standard of fault" is necessary to connect a municipal policy with municipal employees' unconstitutional acts "lest municipal liability under § 1983 collapse into *respondeat superior*.").

However, a substantive due process violation requires more than simply but-for causation. It also requires an intent to punish, and when punitive intent motivates a

facially constitutional policy that is implemented by the creation of unconstitutionally punitive conditions of confinement, imposing liability upon the policymaker is very different from imposing *respondeat superior* liability. Cf. *Brock* v. *Wright*, 315 F.3d 158, 167 (2d Cir. 2003) (permitting liability where unconstitutional acts were taken in implementation of policy that was ambiguous on its face but was interpreted and intended by the policymaker to call for those acts). A facially constitutional policy that was expressly intended to cause the kind of constitutional violation it ultimately caused constitutes behavior upon which *direct* liability may properly be premised.

I conclude that plaintiffs have failed to state a claim that the DOJ defendants violated their substantive due process rights because the Complaint does not plausibly plead that the DOJ defendants possessed punitive intent. Although an inference of punitive intent may be drawn from the conditions themselves, in evaluating the sufficiency of the allegations against the DOJ defendants it is useful to bear in mind what the plaintiffs do *not* allege. They do not allege that the DOJ defendants intended that the MDC defendants create the punitive and abusive conditions in which the plaintiffs were detained. Nor do they allege that the DOJ defendants were even aware of those conditions. Rather, they simply contend that the unconstitutional conditions of confinement were the "direct result" of the DOJ defendants' harsh confinement policy, and particularly of their directive to "exert maximum pressure on" the detainees, who "needed to be encouraged in any way possible to cooperate." ¶61. Plaintiffs' counsel contended at oral argument that those marching orders "encourage[d] illegal means" of obtaining detainee cooperation, which in fact were used, and that encouragement supports an inference at this stage

that these defendants intended the resulting detainee abuse. Oral Arg. Tr. 41, ECF No. 759. In effect, and plaintiffs' counsel conceded as much at oral argument, plaintiffs would have me infer from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully* that they intended to punish the plaintiffs. This I cannot reasonably do.

"Generally, a supervisory official is entitled to assume that subordinates will pursue their responsibilities in a constitutional manner." *Smiley by Smiley* v. *Westby*, No. 87 Civ. 6047, 1994 WL 519973, at *8 (S.D.N.Y. Sept. 22, 1994); cf. *Al-Jundi* v. *Estate of Rockefeller*, 885 F.2d 1060, 1065-66 (2d Cir. 1989) (defendant could not be held liable for delegating power to supervisee who acted unconstitutionally in exercising that power because defendant could rely on supervisee to adhere to the Constitution). The DOJ defendants were entitled to expect that their subordinates would implement their directions lawfully, and I cannot reasonably infer that the failure to make that expectation explicit suggests punitive intent. Accordingly, I grant the motion to dismiss plaintiffs' conditions-of-confinement claims with respect to these defendants.

b. *The MDC Defendants*

The plaintiffs seek to hold the MDC defendants responsible for the challenged conditions, some of which were created as a matter of express policy (*e.g.*, regular handcuffing and shackling, deprivation of hygienic implements, strip-searches, constructive denial of exercise) and others of which were not (*e.g.*, verbal and physical abuse, sleep deprivation). I refer to the former group of conditions as the "official conditions" and the latter group as the "unofficial abuse." With respect to the official conditions, the plaintiffs argue that the MDC defendants

(1) created the challenged conditions (2) with the intent to punish. With respect to the unofficial abuse, the plaintiffs contend that all the MDC defendants except Zenk[12] (1) caused plaintiffs' injuries through (2) their deliberate indifference to the risk that such abuse would occur.[13]

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[12] Plaintiffs "do not seek to hold Defendant Zenk responsible for the abuses that occurred [i]n the AMDAX [SHU] beyond those imposed as a matter of policy." Pls.' Mem. Opp. Mot. to Dismiss 41 n.15, ECF No. 749. In addition, plaintiffs do not assert against Zenk any claims arising from activities prior to April 22, 2002, the date he became Warden of the MDC.

[13] The archetypal substantive due process claim for environmental conditions is a claim against prison officials for failing to protect the plaintiff against *privately* inflicted harms. As the Supreme Court has explained, government actors do not generally have a duty to protect persons from private harms, but when the government takes a citizen into its care, such a "duty to assume some responsibility for his safety and general well-being" arises. *DeShaney*, 489 U.S. at 200. The "rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* Accordingly, when a government official is deliberately indifferent to known risks to a prisoner's basic human needs and yet fails to discharge his duty to protect, he may be held liable under the Substantive Due Process Clause. See *Wolfish*, 441 U.S. at 335-36. In this case, plaintiffs allege that the MDC defendants failed to protect them from harms inflicted by their subordinates—*i.e.*, not private individuals but government employees under their supervision. The logic of *Deshaney* and *Wolfish* applies with just as much force to this kind of claim. Thus, because a government official may be held liable for his inaction when he is deliberately indifferent to the known risk of private harms to a prisoner, he may be held liable when he is deliberately indifferent to a known risk of harm at the hands of his own subordinates. This is not supervisory liability or even liability that arises

The Complaint states a plausible claim against all of the MDC defendants for the official conditions. The plaintiffs allege that Hasty ordered the creation of the ADMAX SHU and ordered two of his subordinates, Lopresti and Cuciti, to design extremely restrictive conditions of confinement for those assigned to it; that Cuciti and Lopresti created the written policy setting forth the official conditions; that Hasty and Sherman then approved and implemented that written policy; and that, when Zenk replaced Hasty, he approved and implemented the conditions created under Hasty's watch. These allegations establish that each defendant was a cause of the official conditions, and the conditions themselves permit an inference of punitive intent with respect to every defendant because every defendant had a hand in creating or implementing them. See *Wolfish*, 441 U.S. at 538-39.

The plaintiffs have also stated a claim against all of the MDC defendants for the unofficial abuse. No one questions that the abuse constituted a grave risk to plaintiffs' reasonable safety, and the Complaint plausibly alleges that all of the defendants were deliberately indifferent to—that is, subjectively aware of—that risk and yet did nothing to mitigate it. Indeed, plaintiffs allege that Hasty "was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts," ¶24; Zenk and Sherman made rounds in the ADMAX SHU and were aware of the abusive con-

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from the discharge of supervisory responsibilities. The same theory of liability applies identically to supervisors and subordinates alike: When an officer is deliberately indifferent to a known risk of any threat (public *or* private) to a prisoner's basic human needs and fails to act to mitigate that risk, he may be liable.

ditions there; Lopresti was frequently present in the ADMAX SHU, regularly reviewed documentation of some of the abuses, and received numerous complaints from the Detainees about abuse and mistreatment; Cuciti made rounds in the ADMAX SHU, reviewed logs created by the unit, and heard complaints from the Detainees about the unofficial abuse; and all of the MDC defendants failed to take steps to rectify the abuse. These specific factual allegations suffice to raise the reasonable inference that the MDC defendants had the requisite mens rea and that their inaction in the face of the unofficial abuse caused plaintiffs' injuries.

3. *Qualified Immunity*

The defendants are not entitled to qualified immunity. It was clearly established in 2001 that punitive conditions of confinement could not be imposed upon unconvicted detainees. *Iqbal*, 490 F.3d at 169; *Turkmen I*, 2006 WL 1662663, at *34. See *Bell*, 441 U.S. at 538; *Cuoco* v. *Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). The unique context of the 9/11 attacks did not render the law unclear. As the Second Circuit has observed, the "right not to be subjected to needlessly harsh conditions of confinement" does "not vary with surrounding circumstances." *Iqbal*, 490 F.3d at 159. This right was among those that were "clearly established prior to 9/11, and [it] remained clearly established even in the aftermath of that horrific event." *Id.* at 160.

The MDC defendants argue that even if the law was clearly established, they should be granted qualified immunity because, in holding the plaintiffs in the ADMAX SHU, they were following the facially valid orders of their superiors at the BOP. Specifically, they suggest that their BOP superiors designated the plaintiffs for restrictive confinement, and that they were entitled to as-

sume that their BOP superiors did so because they suspected the plaintiffs of links to terrorism. Therefore, they contend, reasonable officers in their position would not have known that their behavior violated clearly established law. But this argument conflicts with the express allegations in the Complaint[14] that the harsh confinement policy was facially discriminatory and that the MDC defendants were informed that law enforcement had no information linking the plaintiffs to terrorism. Accordingly, I find the argument without merit and deny qualified immunity.

### C. Claim Two: Equal Protection Claims

Plaintiffs bring a *Bivens* claim for violation of their equal protection rights under the Due Process Clause of the Fifth Amendment.[15] They contend that defendants created and implemented the harsh confinement policy because of their race, religion, and national origin. Specifically, plaintiffs assert that the harsh confinement poli-

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[14] The defendants contend that the plaintiffs cannot partially incorporate the OIG Reports, *i.e.*, that they must incorporate them wholesale rather than only to the extent they do not conflict with the allegations of the Complaint. I reject this suggestion. There is a difference between disputing the words that appear in an incorporated document (impermissible) and disputing the truth of those words (permissible). Although plaintiffs could not incorporate the OIG Reports and then allege that they do not say what they plainly say, they need not incorporate all of the allegations in the Reports for their truth. See *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

[15] The availability of a *Bivens* remedy for violations of the Equal Protection Clause has been conclusively established. See *Davis* v. *Passman*, 442 U.S. 228 (1979).

cy was facially discriminatory, as it was expressly directed at Muslim and Arab men.[16]

1. *The Elements of the Claim*

To prevail at this stage on their equal protection claim, plaintiffs must plausibly allege that defendants' (1) discriminatory animus (2) caused plaintiffs' injuries. *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Hayden* v. *Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999); cf. *Hartman* v. *Moore*, 547 U.S. 250, 259-61 (2006) (explaining, in the context of First Amendment retaliatory discharge claims, that discriminatory animus is insufficient if the complained-of adverse action would have occurred anyway). They may plead discriminatory animus in any of three ways. First, they may plead that defendants adopted or implemented a policy that classifies on the basis of race, religion, or national origin. A "policy is discriminatory on its face if it expressly classifies persons" on the basis of such an unlawful characteristic. *Hayden*, 180 F.3d at 48. Second, they may plead that a facially neutral policy was applied to them in an intentionally discriminatory fashion. *Id.* Third, they may plead that a facially neutral policy was motivated by discriminatory animus and its application resulted in a discriminatory effect. *Id.*

Plaintiffs follow the first route, contending that the harsh confinement policy, which the DOJ defendants created, expressly dictated that Arab and Muslim noncitizens should be detained in restrictive conditions. Oral

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[16] Because the Passaic plaintiffs were not injured by the alleged discrimination—they were held in the general population of the Passaic Jail and thus cannot claim that they were held in harsher conditions than they would have been held if not for their race, religion, and/or national origin—I dismiss their equal protection claims.

Arg. Tr. 59-61, ECF No. 759. They allege that the MDC defendants then implemented that facially discriminatory policy by placing Muslim and Arab noncitizens in the ADMAX SHU because of their race, religion, and/or national origin, causing injury to plaintiffs. Accordingly, plaintiffs must plausibly allege that the DOJ defendants adopted and the MDC defendants implemented such a facially discriminatory policy, which injured the plaintiffs.

2. *The Sufficiency of the Allegations*

The Complaint alleges that Ashcroft, Mueller, and Ziglar created, and Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented, the detention policy, which was expressly directed at Arab and Muslim men.[17] Although only the harsh confinement policy is challenged here, the Complaint alleges that each piece of the detention policy—including the initial arrest, "of interest" treatment, and application of the hold-until-cleared policy—overtly targeted Arab and Muslim individuals. Such allegations "can provide the framework of a complaint, [but] they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. And after careful review of the Complaint, taking due note of the Supreme Court's analysis in *Iqbal*,

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[17] See, *e.g.*, ¶7 ("Plaintiffs' and class members' race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement . . . ."); ¶282 ("In subjecting Plaintiffs and class members to harsh treatment not accorded similarly situated non-citizens, Defendants . . . singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin . . . ."); ¶48 ("Ashcroft, Mueller, and Ziglar's decision to hold [the Detainees] for criminal investigation without evidence of any ties to terrorism was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them.").

I conclude that the facts alleged adequately support the plaintiffs' claims against the MDC defendants, but not against the DOJ defendants.

a. *The DOJ Defendants*

The Complaint fails to allege facts sufficient to raise a reasonable inference that Ashcroft, Mueller and Ziglar created the alleged harsh confinement policy. To be sure, there are ample allegations that these defendants—particularly Ashcroft and Mueller—classified persons on the basis of race, religion and national origin for purposes of arrest and detention. See, *e.g.*, ¶¶40, 41, 43, 44. But those alleged actions do not constitute equal protection violations standing alone. For example, Ashcroft's direction to arrest all male immigration violators between the ages of 18 and 40 from a Middle Eastern country did not, in light of the executive branch's plenary power over immigration, amount to an equal protection violation. See *Turkmen I*, 2006 WL 1662663, at *41-43; *Turkmen II*, 589 F.3d at 550. I have considered whether the discriminatory animus suggested by that direction and the other allegations—regardless of whether they are actionable in themselves—may properly be relied on to suggest animus on the part of Ashcroft, Mueller, and Ziglar with respect to the sole equal protection violation alleged, *i.e.*, the facially discriminatory harsh confinement policy. But there is a critical distinction between a decision to round up violators of the immigration laws and a decision to treat them harshly once they are in federal custody. There is no "equal protection right to be free of selective enforcement of the immigration laws based on national origin, race or religion." *Turkmen II*, 589 F.3d at 542. Because of the broad powers of the political branches in the areas of immigration and naturalization, in that one setting discrimination on grounds of race, religion and

national origin is not invidious. See *Reno* v. *Arab-American Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999). There is indeed an equal protection right to be free of excessively harsh conditions of confinement on those bases, but I am reluctant to allow allegations of lawful conduct to support an inference that the DOJ Defendants created the facially discriminatory confinement policy alleged here.

Plaintiffs' allegations fall short of raising a reasonable inference that Ashcroft, Mueller, and Ziglar created the alleged overtly discriminatory harsh confinement policy. For example, the allegation that the head of the New York FBI field office thought that national origin and religion were relevant to the PENTTBOM investigation requires inference upon inference—that the office head thought these traits were relevant because of Ashcroft, Mueller, or Ziglar's orders and that discrimination with respect to the PENTTBOM investigation translated into discrimination with respect to conditions of confinement—and those inferences are very weakly suggested. Similarly, that Ashcroft, Mueller, and Ziglar were aware that Arab and Muslim noncitizens encountered during the PENTTBOM investigation were, without individualized assessment, automatically treated as "of interest" potentially raises an inference these defendants harbored discriminatory animus. However, because the same allegation is also consistent with a policy to treat everyone encountered during the PENTTBOM investigation as "of interest," this allegation standing alone would be insufficient to render the plaintiffs' equal protection claim plausible.

In making this determination, I acknowledge that the factual allegations before me now are distinguishable from those alleged in *Iqbal*, where the Supreme Court

determined that the plaintiffs failed to state a plausible claim. 556 U.S. at 683. In *Iqbal*, the plaintiffs alleged that Ashcroft and Mueller designated them as of high interest to the PENTBOMM investigation and held them in the ADMAX SHU because of discriminatory animus. *Id.* at 668-69. However, the only relevant factual allegations plaintiffs made at the time were (1) that Ashcroft and Mueller approved of holding "of high interest" detainees in harsh conditions of confinement until they were cleared of suspicion and (2) that thousands of Arab and Muslim individuals were held in harsh conditions of confinement. *Id.* at 681. The Court concluded that the former allegation plausibly suggested only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. And it found that the latter allegation, although consistent with discriminatory animus, was not suggestive of such animus because "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682.

Now, however, the plaintiffs have amplified their claim with more factual allegations. For example, the Complaint alleges that Ashcroft, Mueller, and Ziglar knew that law enforcement lacked any information tying the Detainees to terrorism, suggesting that the harsh confinement policy was not simply about keeping suspected terrorists in secure conditions. And plaintiffs allege that the few individuals initially detained in harsh conditions who were not Arab or Muslim were cleared quickly or

moved into the general population without clearance, demonstrating that at least some non-Arab and non-Muslim individuals were treated differently than the MDC Detainees. I find the issue to be a close one, but after applying the *Iqbal* pleading standard I conclude that these allegations, viewed together with all the allegations in the Complaint, do not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion or national origin.

b. *The MDC Defendants*

With respect to Hasty, Zenk, Sherman, Lopresti, and Cuciti, I conclude that the Complaint raises the reasonable inference that they effectuated the harsh confinement policy and held the Detainees in restrictive conditions of confinement because of their race, religion, and/or national origin. In so determining, I rely upon the allegations set forth above, as well as the allegations that:

- Hasty, Zenk, Sherman, Lopresti, and Cuciti created the harsh conditions at the ADMAX SHU and either personally witnessed or received complaints about how the MDC Detainees were treated there. ¶¶24-28.
- The Detainees were placed in the ADMAX SHU without hearings or individualized determinations of dangerousness. ¶¶68-74.
- Lopresti signed a document that was prepared by Cuciti, and approved by Hasty and Sherman, which untruthfully stated that the executive staff at MDC had classified the "suspected terrorists" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." ¶74.

- Hasty, Sherman, and Lopresti continued to hold the MDC Detainees in the ADMAX SHU even after learning that the FBI had not developed any information to tie them to terrorism. ¶69.
- Staff verbally abused the MDC Detainees by, for example, referring to them as terrorists, insulting their religion, and referring to them as camels. ¶¶109-10. Hasty too referred to the Detainees as terrorists. ¶¶77, 109.
- Staff refused the MDC Detainees' requests to keep the Koran in their cells, to be provided with Halal food, to be told the time of day so they could pray at proper times, and to be told the date so that they could acknowledge Ramadan. ¶132-34. They also frequently interrupted the MDC Detainees' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping them, and telling them to "shut the fuck up," among other things. ¶136.

In light of these factual allegations, and because there is no reasonable dispute that the MDC defendants' conduct caused plaintiffs' injuries, I conclude that the Complaint pleads a plausible equal protection claim against the MDC defendants.

3. *Qualified Immunity*

Qualified immunity is unavailable to any of the MDC defendants. It was clearly established in 2001 that creating and implementing a policy expressly singling out Arabs and Muslims for harsh conditions of confinement violates their Fifth Amendment equal protection rights. See *Iqbal*, 490 F.3d at 174 ("The Plaintiff also alleges that 'Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin.' These

allegations are sufficient to state a claim of animus-based discrimination that any 'reasonably competent officer' would understand to have been illegal under prior case law." (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)); *Hayden*, 180 F.3d at 48 (stating that racial classifications violate the Equal Protection Clause where motivated by racial animus and having a discriminatory effect). In addition, insofar as the MDC defendants seek qualified immunity on the theory that they were following facially valid orders, this gets them nowhere; the Complaint alleges that the harsh confinement policy was facially discriminatory, not facially valid. The defendants are not entitled to qualified immunity on plaintiffs' equal protection claim.

### D. Claims Four and Five: Interference with Communications

The MDC plaintiffs allege that Ashcroft, Mueller, and Ziglar created an explicit policy to limit MDC Plaintiffs' and class members' access to the outside world and that the MDC Defendants implemented that policy in violation of the First Amendment and Fifth Amendment substantive due process rights ("communications claims").[18] ¶¶288-96; Pls.' Mem. Opp. Mot. to Dismiss 69, ECF No. 749. These communications restrictions are alleged to have taken multiple forms: (1) an express policy to hold them incommunicado until mid-October 2001 despite the

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[18] The Complaint also appears to raise a due process claim for defendants' alleged interference with their right to access the courts. ¶294. As plaintiffs' counsel conceded at oral argument, see Oral Arg. Tr. at 56, I dismissed that claim in *Turkmen I*, 2006 WL 1662663, at *48-49, and I see no reason to revisit that decision. To the extent plaintiffs press a claim with respect to their right of access to the courts, it is dismissed.

lack of any basis to believe they had any link to terrorism; (2) the MDC guards effectively denied them one-legal call per week and one social visit per month after the complete communications blackout was lifted; and (3) the MDC defendants permitted the video and audiotaping of the detainees' visits with their attorneys, including the use of sound recording.

1. *Qualified Immunity*

When qualified immunity is raised in a motion to dismiss, court must determine (1) whether the alleged facts demonstrate that a defendant violated a constitutional right; and, if yes, (2) whether this constitutional right was clearly established at the time of the challenged action. *Saucier*, 533 U.S. at 201. As discussed above, following the Supreme Court's decision in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), courts have discretion to elect which prong of the qualified immunity inquiry to consider first. See *Pearson*, 555 U.S. at 236 ("The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). When a court grants immunity at step two of the qualified-immunity analysis, it is within its discretion to decline to address the constitutionality of the defendants' conduct. *Pearson* identified a number of factors that might influence a court to exercise its discretion not to reach the constitutional question: (1) the constitutional violation question "is so factbound that the decision provides little guidance for future cases"; (2) "it appears that the question will soon be decided by a higher court"; (3) deciding the constitutional question requires "an uncertain interpretation of state law"; (4) "qualified immunity is asserted at the

pleading stage" and "the precise factual basis for the . . . claim . . . may be hard to identify"; (5) tackling the first element "may create a risk of bad decisionmaking" due to inadequate briefing; (6) discussing both elements risks "bad decisionmaking" because the court is firmly convinced the law is not clearly established and is thus inclined to give little thought to the existence of the constitutional right; or (7) the doctrine of "constitutional avoidance" suggests the wisdom of passing on the first constitutional question because "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." 555 U.S. at 236-42.

a. *The Initial Communications Blackout*

The inquiry into whether a particular right is clearly established for purposes of qualified immunity looks to "whether it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. This is a context-specific inquiry. The question, therefore, is whether an officer could believe it was objectively reasonable—in light of the specific context—to impose a complete communications ban where, as here, the officers have no basis to form any individualized suspicion that any detainee has any connection to terrorism.

No court has considered whether—in exigent circumstances analogous to those present here—access to telephones or to outside persons can be curtailed for persons detained for civil immigration violations. As plaintiffs' counsel conceded during oral argument, in the abstract it is (and was in 2001) hard to draw the line between communications restrictions that are constitutional and those that are not. See Oral Arg. Tr. at 49-52. For example, counsel agreed that it may be permissible to impose an

"emergency lockdown . . . for a day," but argued that it is clearly established that such a lockdown is unconstitutional when imposed for a longer period. Oral Arg. Tr. at 51. I disagree. Even assuming a lengthier blackout crossed the threshold from permissible to impermissible conduct, I cannot agree that this was so clearly established that qualified immunity is unavailable.[19]

In reaching this conclusion, I take guidance from the Second Circuit's decision in *Iqbal*, 490 F.3d at 143, regarding the significance of the post-9/11 context. Specifically, the court stated that most of the rights asserted here "do not vary with the surrounding circumstances." *Id.* at 159. That category of rights, the court observed, includes "the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination." *Id.* On the other hand, "the gravity of the situation" in the aftermath of the attacks caused the Second Circuit to "recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Id.* The court suggested as an example the Fourth Amendment right to be free from unreasonable searches. Whereas a detainee's "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" and "the right to be free from excessive force and not to be subjected to ethnic or religious discrimination" are not diminished by exigent circumstances, the court ob-

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[19] I acknowledge that I saw this issue differently in *Turkmen I*, 2006 WL 1662663, at *26; however, taking cues both from the Second Circuit's decision in *Iqbal*, 490 F.3d at 159, and the briefing and oral argument on this motion, I have revisited these earlier conclusions.

served that those circumstances might justify an otherwise impermissible warrantless entry into a home. *Id.* at 159-60.

In addition to its potential effect on the *lawfulness* of government conduct, the Second Circuit held that the post-9/11 context has an important bearing on whether law enforcement officers might be justified in *believing*, however incorrectly, that their actions were lawful. *Id.* at 160. Specifically, in reversing on qualified immunity grounds my decision upholding plaintiffs' procedural due process claim, the court referred to the national security concerns at the time in determining that the procedural due process right was not firmly established:

> [U]ncertainty in existing case law is heightened by the fact that, even on the facts alleged in the complaint, which specified that the "of high interest" designation pertained to the Government's post-9/11 terrorism investigation, the investigation leading to the Plaintiff's separation from the general prison population could be reasonably understood by all of the Defendants to relate to matters of national security, rather than an ordinary criminal investigation. Prior to the instant case, neither the Supreme Court nor our Court had considered whether the Due Process Clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security. *Cf.* [*Mitchell* v.] *Forsyth*, 472 U.S. [511] at 534-35 [(1985)] (granting Attorney General qualified immunity for warrantless wiretapping for national security purposes despite prohibitions of warrantless wiretapping in criminal context).

*Id.* at 167.

Assuming *arguendo* that plaintiffs had a right to make phone calls and to be in contact with persons outside the detention facility, and that the right was violated, I conclude that officers of reasonable competence could nonetheless have disagreed about whether their conduct violated that right in light of national security concerns in the aftermath of the 9/11 attacks. Considering the context and the lack of clear case law from the Supreme Court and the Second Circuit, reasonable officers could believe that such a policy—though crude and overbroad—was permissible. Accordingly, I find qualified immunity on these claims for all Defendants.[20]

b. *The Interference with Access to Families and Friends*

It was not clearly established in September of 2001 that social calls and visits could not be carefully restricted, as a matter of policy, for inmates and detainees in administrative segregation. See *Overton* v. *Bazzetta*, 539 U.S. 126, 133 (2003) (Michigan's severely restrictive visitation program did not violate the Constitution because it constituted "a proper and even necessary management technique to ensure compliance with the rules of inmate

[20] I do not reach the merits of whether Plaintiffs' allegations of an express policy to hold the plaintiffs incommunicado states a claim under the First and Fifth Amendments. As discussed above, I am not required to. Moreover, I am mindful of the Supreme Court's admonition in *Camreta* v. *Greene*, 131 S. Ct. 2020 (2011), that lower courts should "think hard, and then think hard again" before unnecessarily deciding the merits of a constitutional issue. *Id.* at 2032. In light of the lack of guidance from the Second Circuit and the Supreme Court on constitutional restrictions on communication rights of pretrial detainees, I conclude that it is appropriate to decline to reach the constitutional question.

behavior, especially for high-security prisoners who have few other privileges to lose.").[21] This conclusion is not changed even assuming, as I must, that the restrictions were imposed here without any individualized assessment of the need for them or suspicion of any connection to terrorism. Even if it were clearly established that the measures alleged here could not be taken lawfully in the absence of individualized intelligence linking each detainee to a security threat, reasonable officers could have concluded otherwise.

The frequency of attorney visits is governed by a regulation stating that "The Warden *generally* may not limit the frequency of attorney visits." 28 C.F.R. §543.13(b) (emphasis added). The regulation permits the warden to "set the time and place for visits" and to "make exceptions according to local conditions or for an emergency situation demonstrated by the inmate or visiting attorney." I owe substantial deference to the institution's interpretation of the regulation. See *Bell*, 441 U.S. at 547 ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed

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[21] Several district courts in the Second Circuit have since held that various types of restrictions on inmate social contacts do not violate the Constitution. See, *e.g.*, *Griffin* v. *Cleaver*, 2005 WL 1200532, at *6 (D. Conn. 2005) (inmate had "no constitutional right to telephone use, social visits and commissary privileges"); *Allah* v. *Poole*, 506 F. Supp. 2d 174, 184-85 (W.D.N.Y. 2007) (not clearly established that a prison could not forbid inmates from speaking languages other than English); *Zimmerman* v. *Burge*, 2008 WL 850677, at *3 (N.D.N.Y. March 28, 2008) (denial of contact visits for drug-addicted inmate for indefinite period of time exceeding two and one-half years bore rational relationship to legitimate penological interests and therefore did not violate Eighth Amendment).

to preserve internal discipline and to maintain institutional security."). In light of these considerations, and given the breadth of the discretion conferred by the regulation and the lack of case law interpreting the term "generally," I conclude that the alleged limitations on the frequency of attorney visits and phone calls did not violate clearly established law. See *Schick* v. *Apker*, 2009 WL 2016933, at *9 (S.D.N.Y. March 5, 2009) (collecting pre-2001 cases); *Smith* v. *O'Connor*, 901 F. Supp. 644, 648 (S.D.N.Y. 1995) (while inmate has constitutional right of access to counsel, this access need not be more than "reasonable"); *Bellamy* v. *McMickens*, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) (no constitutional violation where plaintiff "does not allege that he was denied absolute access to his counsel by the restrictions on his phone calls, but rather that he was delayed in communicating with his attorney") (citing *Lock* v. *Jenkins*, 464 F. Supp. 541, 551 (N.D. Ind. 1978) (provision of weekly calls with counsel was sufficient to satisfy Constitution)).

Even though "[a] prison inmate's rights to communicate with family and friends are essentially First Amendment rights," *Morgan* v. *LaVallee*, 526 F.2d 221, 225 (2d Cir. 1975), the uncertain contours of those rights, taken together with the national security concerns that permeated the context, sufficed to raise a legitimate question among government officials as to whether the First Amendment required the prison officials to afford the Detainees greater access to legal and social calls. *Iqbal*, 490 F.3d at 167-68. Accordingly, I find that there is qualified immunity for all Defendants for these claims.

c. *Video-taping attorney visits*

The most troubling strand of the interference-with-communications claim is the plaintiffs' allegation that the guards overheard or recorded attorney-client telephone

calls and meetings. With some reluctance, I nonetheless conclude that it was insufficiently clear that civil immigration detainees' discussions with their attorneys may not be subject such monitoring under any circumstances, and that qualified immunity is therefore available. Plaintiffs point to no case law from the Second Circuit or the Supreme Court—nor can I find any—that renders it clear that such a policy violates federal constitutional rights. In so holding, I am mindful that there is no need for precedents exactly on point in order for a right to be clearly established. See *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (holding that a constitutional right is clearly established, if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Rather, it is sufficient if, in light of the pre-existing law, "the unlawfulness [is] apparent." *Id.* (internal citations and quotation marks omitted); see also *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011) ("We do not require a case directly on point . . .").

Plaintiffs point out that the recording of inmates' meetings with attorneys is prohibited by 28 C.F.R. §543.13(e), but "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984). The claim for damages here asserts a violation of the First and Fifth Amendments, not §543.13(e), and it was not clearly established that video and auditory recordings of attorney visits with civil immigration detainees offends the Constitution. But see *Lonegan* v. *Hasty*, 436 F. Supp. 2d 419, 422 (E.D.N.Y. 2006) (denying qualified immunity because the regulation at issue "was in effect during the time period at issue and remains in effect at present," rendering the prohibition clearly established); *Ma-*

*lik* v. *Hershberger*, 1995 WL 135558, at *7 (S.D.N.Y. March 29, 1995) (clearly established that guards could not "aural[ly] monitor ... an attorney-client conversation"). Here again, I conclude that the context of the alleged claims has a legitimate impact on the range of conduct that prison officials could reasonably have believed was justified in the interests of national security. *Iqbal*, 490 F.3d at 167.[22]

### F. [*sic*] Claim Three: Interference with Religious Practice

The plaintiffs[23] allege that the DOJ defendants' creation and the MDC defendants' implementation of the harsh confinement policy violated their free exercise rights under the First Amendment. Specifically, they contend that the defendants intentionally burdened the exercise of their religion by (1) subjecting them to verbal and physical abuse; (2) denying them Halal food; (3) refusing to let them keep a Koran in their cells; and (4) interfering with their daily prayer requirements. They assert this claim against all defendants.

#### 1. *The Availability of a* Bivens *Remedy*

In *Iqbal*, the Supreme Court assumed without deciding that a *Bivens* claim is available to remedy a deprivation of a prisoner's free exercise rights, but the Court's opinion suggested skepticism on the issue.[24] Defendants

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[22] Because I find that qualified immunity is available, I need not decide whether a *Bivens* remedy is available for these communications-based claims.

[23] Sachdeva and Bajracharya do not assert this claim at all, and Turkmen asserts this claim only against the DOJ defendants.

[24] The Court wrote as follows on the subject:

> Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context

contend that a damages remedy under *Bivens* is not available, and thus I must first decide whether to extend *Bivens* to this new context.

*Bivens* held that the Fourth Amendment implied a damage remedy against an officer who violated it. *Bivens*, 403 U.S. at 389. The remedy was extended by *Davis* v. *Passman*, 442 U.S. 228 (1979) to a former congressional employee's claim under the equal protection component of the Fifth Amendment Due Process Clause based on her employer's sex discrimination, and again by *Carlson* v. *Green*, 446 U.S. 14 (1988), to a federal prisoner's Eighth Amendment claim based on deliberate indifference to his medical needs. But in the 24 years "[s]ince *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action." *Minneci* v. *Pollard*, 132 S. Ct. 617, 622 (2012). Moreover, two members of the Court have repeatedly described *Bivens* as "a relic of the heady days in which this Court assumed commonlaw powers to create causes

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or new category of defendants." That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush* v. *Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

*Iqbal*, 556 U.S. at 675 (some citations and internal quotation marks omitted).

of action by constitutional implication," which they would end by limiting the *Bivens* damages remedy "to the precise circumstances" of the three cases in which it was implied. *Id.* at 626 (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (internal quotation marks omitted). Nevertheless, for the reasons discussed below, I hold that *Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights.

For new contexts in which a *Bivens* remedy has not yet been recognized, deciding the question involves a two-part inquiry: (1) is there an alternative remedial scheme available to the plaintiffs?; and (2) are there "special factors" that "counsel hesitation" in creating the remedy? *Arar* v. *Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc). I answer both questions in the negative.

There is no remedy for the violation of plaintiffs' free exercise rights in the absence of a *Bivens* claim. The defendants do not contend otherwise. To the contrary, they argue that Congress deliberately chose not to create one. Specifically, they contend that the Immigration and Nationality Act (the "INA") is a comprehensive remedial scheme for the "interest at issue," Ashcroft's Mem. of Law Support Mot. to Dismiss 6, ECF No. 736, presumably referring, at least in part, to the interest in not being subjected to deliberate interference with respect to religious practices. Defendants then admit that the INA affords no remedy for the deprivation of that interest. This decision not to provide plaintiffs with a monetary remedy, the argument concludes, means Congress wanted the judiciary to refrain from extending the *Bivens* remedy into this setting.

This argument, which parallels the Second Circuit's reasoning in *Arar*, does not work in this setting. Arar

had been ordered removed by the INS, and the Deputy Attorney General determined that his removal to Syria, where he was tortured, was consistent with the Convention Against Torture. *Arar*, 585 F.3d at 586. The Second Circuit observed that the provision by Congress of a comprehensive and intricate statutory scheme for review of orders of removal, including review of the government's designation of a particular destination country, would ordinarily[25] warrant the conclusion that another remedy for the wrongful delivery of Arar to the Syrians, *i.e.*, a *Bivens* damage remedy, is unwarranted. *Id.* at 572-73.

The plaintiffs in this case do not complain about their deportations. They are complaining about their treatment before they were deported. "Although . . . the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." *Turkmen I*, 2006 WL 1662663, at *29 (emphases in original).

Most importantly, the plaintiffs are not complaining simply about facially neutral BOP policies that substantially burden their free exercise of religion. If they were, I might conclude that their "full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief . . . and grievances filed through BOP's Administrative Remedy Program,"

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[25] Since the government actively prevented Arar from availing himself of that statutory scheme, the Second Circuit did not rest its decision on this ground. Rather, proceeding to the second step of the analysis, it concluded that there were special factors counseling hesitation before extending the *Bivens* remedy. *Arar*, 585 F.3d at 573.

*Malesko*, 534 U.S. at 62, provides sufficiently meaningful redress to preclude the implication of a *Bivens* damages remedy. But the plaintiffs allege a series of acts that were directed only at them (and the class of detainees they seek to represent) with the specific intent to deny them the right to practice their religion. They have sued the individuals who they allege engaged in those acts, and there is no scheme—statutory or regulatory, comprehensive or otherwise—for a person detained in a federal facility to seek *any* remedy from an officer for intentionally and maliciously interfering with his right to practice his religion. The precise purpose of the *Bivens* damages remedy is to deter individual officers from engaging in such unconstitutional conduct. *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). In short, for these plaintiffs, as for Bivens himself and the plaintiff in *Passman*, "'it is damages or nothing.'" *Passman*, 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, *J.*, concurring in judgment)).[26]

The second inquiry in determining whether a *Bivens* claim should be implied is whether special factors counsel

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[26] Because *Bush* v. *Lucas* may be the source of the Supreme Court's apparent hesitation regarding the availability of a *Bivens* remedy to a First Amendment claim, see *Iqbal*, 556 U.S., at 675 (citing *Lucas*, 462 U.S. 36 (1983)), I have examined the case carefully, but I remain confident that the remedy is available here. *Lucas* involved an aerospace engineer's effort to seek a *Bivens* remedy for a free speech claim even though he had already obtained a remedy under a federal workplace protection statute. The key to the Court's refusal to find an implied damages remedy under the Free Exercise Clause was the fact that Congress had already provided "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Lucas*, 462 U.S. at 368. There are no analogous alternative remedies available to the plaintiffs here.

hesitation before doing so. *Arar* makes abundantly clear that "'[s]pecial factors' is an embracing category," and that it takes very little for a particular factor to counsel sufficient hesitation to preclude the *Bivens* remedy. *Arar*, 585 F.3d at 573-74 ("Hesitation is a pause, not a full stop, . . . and to counsel is not to require."). As a result, federal officials seeking to fend off extensions of the *Bivens* remedy into other contexts face a "remarkably low" threshold. *Id.* at 574. Yet I conclude the officers here have failed to cross it.

Among the special factors that have counseled sufficient hesitation to foreclose the extension of *Bivens* are "military concerns; separation of powers; the comprehensiveness of available statutory schemes; national security concerns; and foreign policy considerations." *Id.* at 573 (citations omitted). The defendants here contend that the national security concerns implicated by the September 11 attacks and their aftermath counsel hesitation in implying a *Bivens* remedy for the violation of the detainees' right to free exercise of religion, and thus preclude me from doing so.

Though the argument has some merit, it does not cover as much ground as the defendants want it to. As discussed above, the Second Circuit recognized in *Iqbal* that national emergencies like the September 11 attacks not only furnish the occasion for the full exercise of government power, but may enlarge that power as well. 490 F.3d at 159-60. Thus, though the government ordinarily detains and commences removal proceedings in furtherance of immigration policies, I previously held in this case that its use of that authority in furtherance of an ulterior motive to hold the detainees until they were cleared of suspicions of terrorism was a lawful (even if rarely used) exercise of its existing power. *Turkmen I*, 2006 WL

1662663, at *1. And that existing power can be enlarged by a national security emergency; for example, as Judge Newman observed in *Iqbal*, the exigent circumstances created by such an emergency "might justify governmental action that would not otherwise be permitted" under the Fourth Amendment. *Iqbal*, 490 F.3d at 159.

But context matters, and the right of a person detained in an American prison not to be subjected to malicious mistreatment by federal officers that is specifically intended to deprive him of his right to free exercise of his religion was not diminished by the September 11 attacks. *Id.* at 159-60. Moreover, the defendants have not even attempted to explain why the availability of a damages remedy if the plaintiffs prove their claim would adversely impact our national security even in the slightest. Intuition suggests the opposite: if an American jury finds that federal officers deprived detainees of the Koran and Halal food, refused to tell them the correct time of day, and banged on their cell doors while screaming profanities and anti-Muslim epithets, all for the specific purpose of interfering with their exercise of their Muslim faith, one would think our national security interests would only be enhanced if the world knew that those officers were held liable for the damages they caused.

In sum, the Supreme Court's treatment of this issue in *Iqbal* indeed suggests the "unsettling possibility" that individuals have no right "to pursue a damages claim for intentional, religiously-based mistreatment at the hands of the federal government." James F. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St. L. Rev. 1387, 1400 (2010). However, because both of the prerequisites for an extension of *Bivens* have been met, I reject that outcome here and hold that the remedy is available.

2. *The Elements of the Claim*

Plaintiffs allege that the defendants created and implemented the harsh confinement policy with the express intention of burdening their right to practice their religion. Accordingly, they must plead that defendants, with the (1) intent to suppress their religious practices, (2) burdened those practices.[27] See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). However, if such a burden advances interests of the highest order and is narrowly tailored in pursuit of those interests, no claim will lie. *Id.* at 546.

3. *The Sufficiency of the Allegations*

a. *The DOJ Defendants*

As with their equal protection claim, plaintiffs' free exercise claim against the DOJ defendants is premised upon the DOJ defendants' creation of a facially constitutional policy that was implemented unconstitutionally. Specifically, plaintiffs appear to contend that the DOJ defendants created the harsh confinement policy with the intent to suppress the Detainees' religious practices and that this policy, when implemented by the MDC defendants, did ultimately cause such a burdening of the exercise of their religion.[28]

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[27] When a *neutral* prison policy impinges on inmates' fundamental constitutional rights, the policy is valid if it is "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); accord *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Benjamin* v. *Coughlin*, 905 F.2d 571, 574 (1990). However, because *intentional* burdening of religious practices is involved here, the *Turner* v. *Safley* standard does not apply.

[28] It may be possible to state a free exercise claim against government officials who cause a burden on a plaintiff's free exercise of his religion not with the specific intent to burden that exercise but with

The Complaint fails to plausibly plead that the DOJ defendants intended to burden the plaintiffs' free exercise of their religion. As with plaintiffs' substantive due process claim, this claim appears to rest on an argument that, because their policy was implemented unconstitutionally, they must have intended that result. Thus, for the same reasons set forth in my discussion of the substantive due process claim, I conclude that the DOJ defendants' failure to specify that their policy be implemented lawfully does not raise the reasonable inference that they intended for the policy to be implemented unlawfully. Accordingly, I dismiss the free exercise claim against the DOJ defendants.

b. *The MDC Defendants*

The MDC defendants are alleged to have implemented policies (*e.g.*, forbidding the MDC Detainees from keeping any items, including the Koran, in their cells) that burdened the exercise of their religion. They are also alleged to have failed to stop MDC guards from engaging in abusive conduct unsanctioned by express policy (*e.g.*, verbal and physical abuse) that further burdened the Detainees' religious practices. The Complaint contends that the MDC defendants engaged in such conduct with the intent to suppress the MDC Detainees' religious practices.

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the more general intent to subject people of a particular religion to an adverse action on the basis of that religion. See *Iqbal*, 556 U.S. at 676 (assuming that intentional discrimination with respect to placement in the ADMAX SHU burdens free exercise rights) (citing *Lukumi*, 508 U.S. at 540-41); cf. *McDaniel* v. *Paty*, 435 U.S. 628 (1978). This kind of more general religious discrimination claim does not appear to be advanced by the plaintiffs in this case, and I thus do not consider whether the Complaint might adequately plead such a claim.

With respect to the abusive conduct unsanctioned by express policy, the plaintiffs have adequately pleaded that the MDC defendants were deliberately indifferent to the known risk that their subordinates, MDC prison guards, would violate the Detainees' free exercise rights. Indeed, as with the First and Fifth Amendment claims discussed above, the Complaint adequately alleges that the MDC defendants were aware of the abusive conduct of the MDC guards. See ¶¶24-28. None of the MDC defendants contest—and it cannot be reasonably contested—that this policy of inaction satisfies the strict scrutiny required under *Lukumi*. See 508 U.S. at 546. And defendants' inaction in the face of such outrageous abuse suffices, at this stage, to render plausible plaintiffs' allegation that the MDC defendants intended to suppress their religious practices and that the MDC defendants' misconduct caused the plaintiffs' injuries. With respect to the burdens imposed as a matter of express policy, no question exists that defendants' actions caused the injuries alleged and, as already established, the Complaint adequately pleads intent. Finally, while it is possible that these challenged restrictions may in fact be narrowly tailored to a sufficiently important interest, this is not obvious on the face of the Complaint and defendants must await discovery to so prove. See *Iqbal*, 490 F.3d at 173-74.

4. *Qualified Immunity*

I reject the MDC defendants' argument that they are entitled to qualified immunity. The plaintiffs' right to a reasonable opportunity to worship has long been clearly established. See, *e.g.*, *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972) ("If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere

to conventional religious precepts, then there was palpable discrimination by the States against the Buddhist religion"); see also *Salahuddin* v. *Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993) (holding that it is "well established that prisoners have a constitutional right to participate in congregate religious services."). And if the well-pleaded allegations of intentional interference with the plaintiffs' religious practices are proven, no officer could reasonably believe that the conduct at issue was lawful. Accordingly, I conclude, as did the Second Circuit in *Iqbal*, that the plaintiffs' allegations in claim three "suffice to preclude a qualified immunity defense at this stage of the litigation." 490 F.3d at 173.[29]

### E. [*sic*] Claim Six: Unreasonable Strip Searches (Fourth Amendment)[30]

The MDC plaintiffs also bring Fourth Amendment claims against the MDC defendants for subjecting them to unreasonable strip searches.[31] ¶¶297-302. They allege that they were strip-searched repeatedly and unnecessarily, in a humiliating and unreasonable manner.

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[29] It bears emphasis that the qualified immunity defense to this claim and the others as well may need to be revisited as the case progresses. I assume, as I must at this stage, the truth of the plaintiffs' factual allegations. At later stages, more will be required of the plaintiffs, and if only some of their allegations are properly supported by admissible evidence, the qualified immunity defense may be available. See, *e.g.*, *Coley* v. *Smith*, 441 F. App'x. 627, 629 (11th Cir. 2011) (failure to provide Muslim inmate with exact food he requested for Eid-ul-Fitr feast on correct day did not violate clearly established law).

[30] Plaintiffs also allege in Claim Six that the strip searches violated their right to substantive due process. That aspect of the claim is discussed above in tandem with Claim One.

[31] Only Benatta and Hamouda assert this claim again Zenk.

1. *Elements of the Claim*

In order to state a claim that the MDC defendants subjected them to unreasonable strip searches in violation of the Fourth Amendment, the plaintiffs must plead that the MDC defendants (1) caused them to be strip searched and (2) that the strip searches were not reasonably related to legitimate penological interests. See *Covino* v. *Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Iqbal*, 490 F.3d at 172. A search conducted in an unreasonable manner is not reasonably related to legitimate penological interests. See *Schmerber* v. *California*, 384 U.S. 757, 768 (1966).

2. *Sufficiency of the Allegations*

The Complaint alleges that the searches were conducted to punish and humiliate, without any penological justification. The MDC plaintiffs allege that they were strip searched every time they were removed from or returned to their cells, including after non-contact legal and social visits, and were subject to random strip searches even while in their cells. They also allege that they were, for example, strip searched multiple times in a row—even though they had no opportunity to acquire anything between the strip searches—and verbally abused and videotaped during the strip searches. The Complaint alleges that these searches were conducted pursuant to a facially unconstitutional policy created and implemented by the MDC defendants.

The Complaint states an unreasonable search claim against all of the MDC defendants. The defendants are alleged to have created a policy that, by its terms, mandated searches that were untethered to any legitimate penological purpose, see *Hodges* v. *Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (holding that consecutive body cavity searches of inmates are unreasonable); *Covino*, 967 F.2d

at 80 (searches used to harass and punish inmate are unreasonable); *Bono* v. *Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980) (strip searches of inmates after non-contact visits are unreasonable unless there is some risk that contraband will be smuggled into prison), and performed in a humiliating manner, cf. *Schmerber*, 384 U.S. at 768. According to the Complaint, Hasty and Zenk ordered the creation of an unreasonable and punitive strip search policy, and Cuciti, with the help of Sherman and Lopresti, developed the specific policy. The MDC defendants do not challenge the plausibility of these allegations, and they clearly suffice to plead that each of the MDC defendants' own actions caused the unreasonable strip searches alleged.

3. *Qualified Immunity*

The allegations against the MDC defendants state a violation of clearly established Fourth Amendment law. It was clearly established at the time that a strip search policy designed to punish and humiliate was not reasonably related to a legitimate penological purpose and thus violated the Fourth Amendment, and no reasonable officer could have believed that the policy alleged was constitutional. See *Iqbal*, 490 F.3d at 173 ("It was clearly established that . . . strip and body-cavity searches be rationally related to legitimate government purposes."); *Hodges*, 712 F.2d at 35.

**F. [*sic*] Claim Seven: Conspiracy to Violate Civil Rights**

Plaintiffs' final claim is brought under 42 U.S.C. § 1985(3), which prohibits conspiracy "for the purpose of depriving . . . any person or class of person of the equal protection of the laws," and provides a private cause of action against the alleged conspirators. The plaintiffs allege that the DOJ defendants and, separately, the

MDC defendants conspired together to hold them in the harsh conditions of confinement discussed herein in violation of their equal protection rights.[32]

1. *Elements of the Claim*

To make out a claim under Section 1985, plaintiffs must plead and prove four elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States." *Mian* v. *Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). The conspiracy must be motivated by some class-based animus. *Iqbal*, 490 F.3d at 176 (citing *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971)).

2. *Sufficiency of the Allegations*

For the reasons set forth above, the plaintiffs plausibly plead that Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented the facially discriminatory harsh confinement policy and the interference with their free exer-

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[32] The defendants challenge whether this statute is applicable to them as federal officials in their individual capacities. The Second Circuit has held that, although it was not clearly established in 2001 that Section 1985 prohibited conspiracies among federal officials, "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws" where the officials' behavior "would violate the equal protection clause." *Iqbal*, 490 F.3d at 176. The defendants were thus on notice in 2001 that an allegation of conspiracy could arise from their alleged treatment of the plaintiffs.

cise of their religion, all as alleged in Claims One, Two, Three, and Six. The same allegations state a claim for a conspiracy motivated by class based animus and, accordingly, I conclude plaintiffs' §1985(3) claim is plausibly pleaded as against these MDC Defendants only. See *Iqbal*, 490 F.3d at 177.

3. *Qualified Immunity*

Defendants also suggest that they are entitled to qualified immunity because in 2001 it was not clearly established that Section 1985 applied to federal officials. As the Second Circuit has already explained, however, although it may not have been clearly established in 2001 that §1985 prohibited conspiracies among federal officials, "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." *Id.* at 176. "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo* v. *City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) (emphases in original). Accordingly, qualified immunity is inappropriate.

## CONCLUSION

For the reasons set forth above, defendants' motions to dismiss are denied in part and granted in part. The motions filed by the DOJ defendants are granted in their entirety. The motions filed by the MDC defendants are granted in part and denied in part. Specifically, they are denied with respect to the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two and Six) and the free exercise claim (Claim Three). They are granted with respect to the claims based on the alleged communications blackout and interference with counsel (Claims Four and Five). Finally, the motion to dismiss the conspiracy claim

(Claim Seven) is denied to the extent that the underlying objects of the conspiracy in Claims One through Six have survived the motion and granted to the extent they have not.

Counsel for the remaining parties are directed to appear before Chief Magistrate Gold for a status conference on January 30, 2013 at 2:00 PM.

So ordered.

John Gleeson, U.S.D.J.

Dated: January 15, 2013
Brooklyn, New York

# APPENDIX C
# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 13-981-L

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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellees-Cross-Appellants,*

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY,

*Defendants-Appellants,*

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,

*Defendants-Cross-Appellees,*

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN; JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

*Defendants.*

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**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand fifteen.**

**PRESENT: DENNIS JACOBS,**
**JOSÉ A. CABRANES,**
**ROSEMARY S. POOLER,**
**REENA RAGGI,**
**RICHARD C. WESLEY,**
**PETER W. HALL,**
**DEBRA ANN LIVINGSTON,**
**GERARD E. LYNCH,**
**DENNY CHIN,**
**RAYMOND J. LOHIER, JR.,**
**SUSAN L. CARNEY,**
**CHRISTOPHER F. DRONEY,**
Circuit Judges.[1]

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ORDER

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Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case en banc. A poll having been conducted and there being no majority favoring en banc review, rehearing en banc is hereby **DENIED.**

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[1] Robert A. Katzmann, Chief Judge, took no part in the consideration or decision of this case.

Rosemary S. Pooler and Richard C. Wesley, Circuit Judges, concur by opinion in the denial of rehearing en banc.

Dennis Jacobs, José A. Cabranes, Reena Raggi, Peter W. Hall, Debra Ann Livingston, and Christopher F. Droney, Circuit Judges, dissent by opinion from the denial of rehearing en banc.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

ROSEMARY S. POOLER and RICHARD C. WESLEY, Circuit Judges, concurring in the denial of rehearing en banc:

Our dissenting colleagues lament that the majority opinion in this matter presents the first circuit decision in the country allowing a *Bivens* claim for an "executive policy" enacted in response to a national emergency. We disagree. The majority opinion acknowledges that *Iqbal* confirmed that it was constitutionally permissible for the Attorney General to subject detainees with suspected ties to terrorism to restrictive conditions of confinement. The majority opinion is unanimous in concluding that plaintiffs have no claim in that regard.

Our differences arise from the significance of what we conclude is a plausibly pled allegation that the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy. The Attorney General is alleged to have endorsed the restrictive detention of a number of men who were Arabs or Muslims or both—or those who appeared to fit those categories—that resulted from the fear and frenzy in greater New York following the 9/11 attacks in which suspicion was

founded merely upon one's faith, one's appearance, or one's native tongue.

Moreover, the dissenters fail to note that two of the defendants in this case ran the Metropolitan Detention Center and are alleged to have filed false documents with regard to the risk assessments of detainees and to have encouraged a dangerous environment for those detainees at the facility. As alleged in the complaint and documented by the Inspector General's report and national media, this included assaults, daily strip searches, and numerous other degrading acts. All of these actions, were they to have occurred in a regular prison environment and been employed against an inmate not suspected of posing any security risk, would have been considered unlawfully punitive. See *Bell* v. *Wolfish*, 441 U.S. 520, 539 (holding that particular conditions or restrictions of pretrial detention must be reasonably related to a legitimate governmental objective); see also, *e.g.*, *Stoudemire* v. *Mich. Dep't of Corrs.*, 705 F.3d 560, 574 (6th Cir. 2013) ("'[A] strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual.'" (quoting *Wood* v. *Clemons*, 89 F.3d 922, 928 (1st Cir. 1996)). This view accords not only with *Iqbal*, but also with both our own prior precedent and the views expressed by several of our sister circuits in the wake of *Iqbal*. See, *e.g.*, *Walker* v. *Schult*, 717 F.3d 119, 125 (2d Cir. 2013); *Dodds* v. *Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010); *Starr* v. *Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011).

This case has drawn this Court's attention now for over thirteen years. The majority opinion and dissent have analyzed many arguments (including Judge Raggi's *Bivens* concerns, which were not even advanced by the government) and hundreds of cases. The length of our

efforts now fills many pages. In our view, it is time to move the case forward.

DENNIS JACOBS, JOSÉ A. CABRANES, REENA RAGGI, PETER W. HALL, DEBRA ANN LIVINGSTON, and CHRISTOPHER F. DRONEY, Circuit Judges, dissenting from the denial of rehearing en banc:

In this case, a sharply divided panel makes our court the first in the nation to imply a *Bivens* damages action[1] against senior Executive Branch officials—including the former Attorney General of the United States and the Director of the FBI—for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks. See *Turkmen* v. *Hasty*, 789 F.3d 218 (2d Cir. 2015); *id.* at 265 (Raggi, J., dissenting in part). The question of whether to rehear this case en banc has now evenly divided the active judges of the court (6-6), which means defendants' petitions for rehearing will be denied. We six judges who voted for rehearing respectfully dissent from that denial.[2]

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[1] See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Our court's historic reluctance to revisit panel opinions en banc has been questioned both in cases where we are the outlier in a circuit split, see 2002 Judicial Conference of the Second Circuit, Remarks by Justice Ginsburg, 221 F.R.D. 38, 223 (2002) (suggesting Second Circuit might be "a bit too resistant to en banc rehearing"), and in cases where we have deemed the issues so important as to make Supreme Court review likely, cf. *Ricci* v. *DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008) (Jacobs, C.J., dissenting from denial of rehearing en banc) ("If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits.").

The panel decision raises questions of exceptional importance meriting further review. These concern our court's faithful adherence to controlling Supreme Court precedent respecting (1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims. Judge Raggi discusses each of these points in detail in her panel dissent. See *id.* at 265-302. We incorporate that opinion here, which allows us to avoid repeating its analysis in summarizing our reasons for seeking en banc review.

* * *

In June 2001, the Supreme Court observed that the threat of "terrorism" might demand "heightened deference to the judgments of the political branches with respect to matters of national security," including "forms of preventive detention" for illegal aliens. *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001). Less than three months later, the deadliest terrorist attack in the history of this nation—committed by aliens operating under foreign direction—presented federal officials with what even the panel majority acknowledges were "unprecedented challenges" in protecting our homeland from further harm. *Turkmen* v. *Hasty*, 789 F.3d at 226.[3] Astoundingly, given these circumstances, this court now implies a *Bivens* damages action—a practice that is generally "disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), and usually "unjustified," *Wilkie* v. *Robbins*, 551 U.S. 537, 550

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[3] See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 667 (2009) (describing "vast" federal investigation "to identify the assailants and prevent them from attacking anew"); see also *Turkmen* v. *Hasty*, 789 F.3d at 277 n.19 (Raggi, J., dissenting in part) (discussing various events in five months following 9/11 that fueled fear of further imminent terrorist attacks).

(2007)—to expose the former Attorney General, FBI Director, and other federal officials to potentially unlimited personal liability for their efforts to provide such protection.[4]

We are the first court to use *Bivens* to this effect. Four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks. See *Vance* v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Doe* v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Mirmehdi* v. *United States*, 689 F.3d 975 (9th Cir. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); see also *Meshal* v. *Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015); *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009). The panel decision puts this court at odds not only with these sister circuits, but also with controlling Supreme Court precedent in the following three areas of law.

1. *The Proper Scope of Bivens Actions*

After implying damages actions against federal officials on three occasions in the decade between 1971 and 1980, the Supreme Court has never done so again.[5] Rather, it has consistently emphasized that *Bivens* actions are limited to a few established contexts, and that those contexts cannot be generalized to extend *Bivens* further. See *Wilkie* v. *Robbins*, 551 U.S. at 549-50. Only by rede-

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[4] It was the President of the United States who, by written instructions, assigned responsibility for homeland security after 9/11 to the Attorney General and FBI Director, as well as to the CIA Director. See *id.* at 273 n.9 (Raggi, J., dissenting in part).

[5] See *id.* at 267 (Raggi, J., dissenting in part) (tracing history of *Bivens* actions in Supreme Court).

fining the few established *Bivens* contexts at an impermissibly "high level of generality" has the panel majority here been able to avoid its obligation to consider whether a judicially implied damages action is "the best way" to implement constitutional guarantees in the unprecedented legal and factual circumstances of this case. *Id.* at 500, 561-62 (requiring such judgment to extend *Bivens*, and recognizing that Congress is usually in "far better position" than courts to evaluate impact of new species of litigation against those who act in public's behalf).[6]

The majority thereby further avoids consideration of various factors strongly counseling hesitation in extending *Bivens* here. See *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). These factors include the following:

(a) plaintiffs here challenge an executive policy, rather than individual rogue action, the typical *Bivens* scenario;[7]

(b) the challenged policy implicates the executive's immigration authority;[8]

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[6] See *id.* at 268-69 (Raggi, J., dissenting in part) (explaining why generalization of *Bivens* contexts elides requirement for considered judgment about "best way" to implement constitutional guarantees in particular legal and factual circumstances).

[7] See *id.* at 272-74 (Raggi, J., dissenting in part) (discussing why *Bivens* has never been considered "'proper vehicle for altering an entity's policy'" (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001))).

[8] See *id.* at 274-75 (Raggi, J., dissenting in part) (referencing Supreme Court's recognition that "'any policy toward aliens'" is so interwoven with foreign relations, war powers, and other matters "'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference'" absent congressional authorization (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952))).

(c) the policy further implicates the executive's responsibility for national security, here exercised in a time of crisis;[9] and

(d) Congress's failure to provide a damages remedy despite longstanding awareness of the concerns raised in this lawsuit.[10]

In opposing en banc review, the members of the panel majority attempt to minimize the significance of their *Bivens* ruling by asserting that it does not extend to executive policy challenges but applies only to the Attorney General's alleged ratification of "the rogue acts of a number of field agents in carrying out his lawful policy." Pooler and Wesley, JJ., Op. Concurring in Denial of Reh'g En Banc ("Pooler and Wesley, JJ., Op."), ante at [1]. The assertion is belied however both by (1) plaintiffs' complaint, which specifically sues the Attorney General and FBI Director for the policies they allegedly developed and created in response to the 9/11 attacks, see *Turkmen* v. *Hasty*, 789 F.3d at 227, 263 (quoting Compl. ¶¶39-49, 75); and (2) the majority's own opinion, which holds that plaintiffs can use a *Bivens* action against the Attorney General, FBI Director, and others to challenge, not any rogue actions by field agents, but the "MDC confinement policy" of holding 9/11 detainees in "'particular-

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[9] See *id.* at 275-78 (Raggi, J., dissenting in part) (quoting Supreme Court's observation that "'[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention'" in absence of congressional or constitutional authorization, such as habeas corpus guarantee (quoting *Haig* v. *Agee*, 453 U.S. 280, 292 (1981), and citing *Department of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988))).

[10] See *id.* at 278-80 (Raggi, J., dissenting in part) (tracing Congress's awareness).

ly restrictive'" conditions until cleared of terrorist connections, *id.* at 228 (emphasis added) (quoting Compl. ¶176); see *id.* at 239 (concluding that pleadings plausibly allege that Attorney General "affirmatively supported" restrictive conditions).

Our concurring colleagues further confuse the issue by lumping together certain challenged policy actions, *e.g.* daily strip searches, with rogue conduct not authorized by any policy, *e.g.* assaults. See Pooler and Wesley, JJ., Op., *ante* at [2]. Plaintiffs' ability to use a *Bivens* action against individual prison officers for such rogue conduct is not at issue on this appeal.

Thus, to ensure this court's adherence to controlling Supreme Court precedent regarding the narrow scope of *Bivens* actions in the context of the restrictive confinement policy challenge here at issue, we should rehear this case en banc.[11]

2. *The Broad Shield of Qualified Immunity*

Controlling Supreme Court precedent instructs that qualified immunity must be afforded defendants in this case unless the constitutional rights asserted by plaintiffs

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[11] This court's duty to follow Supreme Court precedent regarding the narrow scope of *Bivens* actions—a matter implicating the separation of powers critical to our constitutional structure, see *id.* at 266 n.2, 267 (Raggi, J., dissenting in part)—exists independently of any arguments made, or not made, by the government. See generally *Valdez* v. *United States*, 518 F.3d 173, 181-82 (2d Cir. 2008) (recognizing court's discretion to review unpreserved issue to remedy obvious misapplication of law). Compare Pooler and Wesley, JJ., Op., *ante* at [3] (asserting that concerns raised in panel dissent were not advanced by government on appeal), with *Turkmen* v. *Hasty*, 789 F.3d at 268 n.4 (Raggi, J., dissenting in part) (observing that government raised *Bivens* challenge in moving for dismissal but did not pursue after receiving relief on other grounds).

were so clearly established with respect to the "*particular* conduct" and the "specific context" at issue that every reasonable official would have understood that his conduct was unlawful. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (emphasis in original) (internal quotation marks omitted); see *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080, 2083 (2011). The panel majority here maintains that plaintiffs, although lawfully arrested and detained, had a right not to be restrictively confined in the absence of an individualized suspicion of dangerousness. But it cites no case clearly establishing such a right, let alone a case clearly establishing the unlawfulness of defendants' particular conduct in light of the specific context of this case. See *Mullenix* v. *Luna*, 136 S. Ct. at 308. Instead, considerable precedent, including *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979), cited by our concurring colleagues, see Pooler and Wesley, JJ., Op., *ante* at [2], suggests that restrictive confinement of lawfully detained persons can be based on general, rather than individualized, suspicion of dangerousness.[12]

We should, therefore, review en banc the panel majority's denial of qualified immunity in the unprecedented circumstances of this case.[13]

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[12] See *Turkmen* v. *Hasty*, 789 F.3d at 277, 290-93 (Raggi, J., dissenting in part) (discussing *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012); *Whitley* v. *Albers*, 475 U.S. 312, 316 (1986); *Block* v. *Rutherford*, 468 U.S. 576, 585-87 (1984); *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979), and detailing experiences giving rise to general suspicion in this case).

[13] In opposing en banc review, our concurring colleagues assert that "it is time to move the case forward." Pooler and Wesley, JJ., Op., *ante* at [3]. But qualified immunity dictates that damages actions not move forward unless the constitutional right at issue was so clearly established in the particular context of the case as to be beyond dis-

3. *The* Iqbal *Pleading Standard*

In its earlier review of this very case (then bearing a different caption), the Supreme Court made clear that to survive dismissal, plaintiffs had to plead a plausible claim grounded in a factual basis. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. The Court instructed that this standard could not be satisfied by pleading facts "merely consistent with a defendant's liability," because that fell "short of the line between possibility and plausibility." *Id.* (internal quotation marks omitted). As Judge Raggi's careful discussion of the pleadings and incorporated documents demonstrates, the majority's identification of viable claims, particularly policy-challenging claims against the Attorney General and FBI Director, frequently relies only on hypothesized possibilities,[14] or on conclusory assumptions or insinuations of discriminatory purpose that the Supreme Court has already rejected. See Pooler and Wesley, JJ., Op., *ante* at [1] (repeating conclusory assumptions).[15] The need to ensure faithful adherence to

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pute. See *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2019 (2014) ("Qualified immunity is an immunity from suit rather than a mere defense to liability." (internal quotation marks and brackets omitted)); see also *Ashcroft* v. *Iqbal*, 556 U.S. at 685 (explaining that "basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery" (internal quotation marks omitted)). Thus, we should not hesitate to take the time for en banc review to ensure that the Attorney General, FBI Director, and other officials are not subjected to further litigation based on rights not clearly established by law.

[14] See *Turkmen* v. *Hasty*, 789 F.3d at 282-90 (Raggi, J., dissenting in part) (explaining how majority's hypotheses as to possible involvement of Attorney General and FBI Director in challenged detentions are actually belied by record facts).

[15] In *Ashcroft* v. *Iqbal*, the Supreme Court stated that restrictive confinement of 9/11 detainees until cleared of terrorist activities did not

the Iqbal pleading standard, pronounced by the Supreme Court in this very case, is thus a further reason for en banc review.

* * *

To conclude, we observe that our court's failure to adhere to controlling Supreme Court precedent would raise a serious concern in any case. But here, that concern is compounded by the panel's departure from precedent in three areas of law. Further, this concern arises in a case requiring a former Attorney General and FBI Director, among other federal officials, to defend against claims for money damages based on a detention policy applied to illegal aliens in the immediate aftermath of a terrorist attack on this country by aliens. Together, these circumstances present important legal issues warranting full-court review.[16] Further, the Supreme Court has already once reviewed—and reversed—this court for allowing plaintiffs to pursue deficient claims against the Attorney

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state a constitutional claim absent plausible allegations that the restrictions were "due to" the detainees' "race, religion, or national origin." 556 U.S. at 683. Further, the Court held that the disparate impact on Arab Muslims of the hold-until-cleared policy was not enough to imply discriminatory intent given that the 9/11 attacks were carried out by Arab Muslim members of an Islamic fundamentalist group comprised largely of Arab Muslims. See *id.* at 682. Judge Raggi's dissent explains why *Iqbal*'s reasoning necessarily defeats plaintiffs' amended pleadings. See *Turkmen* v. *Hasty*, 789 F.3d at 295-300.

[16] While the focus of our concern in seeking en banc review is the panel majority's decision to allow plaintiffs to pursue damages against the Attorney General and FBI Director, Judge Raggi's dissent explains why plaintiffs' policy-based claims against other officials should also be dismissed, obviating the need for us to discuss them here. See *id.* at 293-95, 298-302.

General and FBI Director in this case. See *Ashcroft* v. *Iqbal*, 556 U.S. 662. This litigation history, when considered together with the sharp panel division, the even division (6-6) of active judges in the en banc poll, and our split from sister circuits, only reinforces the propriety of our rehearing this case ourselves in advance of any possible further consideration by the Supreme Court.

Accordingly, we dissent from the denial of defendants' petitions for en banc review.

## APPENDIX D
## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides in relevant part:

**Amendment IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 42 of the United States Code provides in relevant part:

**§ 1985. Conspiracy to interfere with civil rights**

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the

due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

## APPENDIX E
## UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF NEW YORK

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No. 02 CV 2307 (JG)(SMG)

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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs,*

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY; JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE; SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN; JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

*Defendants.*

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## FOURTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

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Plaintiffs Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ah-

med Khalifa, Saeed Hammouda, and Purna Raj Bajracharya (collectively "Plaintiffs") by and through their attorneys, allege the following:

## NATURE OF ACTION

1. Plaintiffs bring this class action on behalf of themselves and a class of male non-citizens from the Middle East, South Asia, and elsewhere who are Arab, South Asian or Muslim or were perceived by Defendants to be Arab, South Asian or Muslim, and were arrested on minor immigration violations following the September 11, 2001 terrorist attacks on the United States ("9/11 detainees"). Each Plaintiff was subjected to a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation (called "PENTTBOM"), and discovered to be a non-citizen who had violated the terms of his visa, was arrested and treated as "of interest" to the government's terrorism investigation. This of interest treatment did not depend on any law enforcement evaluation; it was automatic and based solely on the race, national origin, and religion or perceived race, national origin, and religion of the Plaintiffs and class members. It did not matter whether the tip was wholly implausible, or even whether the non-citizen was the subject of the tip or just encountered incidentally. In fact, there was no reason to suppose Plaintiffs or class members had any connection to terrorism.

2. Nevertheless, each of interest Plaintiff was subjected to a blanket "hold-until-cleared" policy. Although they could have been removed promptly from the United States because of their immigration violations, pursuant to this policy they were instead retained by the agency then known as the Immigration and Naturalization Service ("INS") in immigration custody until the Federal

Bureau of Investigation ("FBI") affirmatively cleared them of terrorist ties. Eventually, all Plaintiffs and class members were in fact cleared of any connection to terrorism.

3. Plaintiffs and class members were detained without regard to whether they posed a danger or flight risk and were denied a timely hearing before a neutral judicial officer on whether probable cause existed to justify detaining them beyond the time necessary to secure their removal or voluntary departure from the United States. Instead of being presumed innocent until proven guilty, the 9/11 detainees were presumed guilty of terrorism until proven innocent to the satisfaction of law enforcement authorities.[1]

4. Some class members, like Turkmen and Sachdeva ("Passaic Plaintiffs") were detained in Passaic County Jail in New Jersey; others, like Abbasi, Mehmood, Benatta, Khalifa, Hammouda, and Bajracharya ("MDC Plaintiffs") were sent to the Metropolitan Detention Center ("MDC"), a federal facility in Brooklyn, New York. Some of these MDC Plaintiffs, like Hammouda and Benatta, were classified by the FBI as being "high interest" and placed in the most highly restrictive prison setting possible—the MDC's Administrative Maximum Special Hous-

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[1] The hold-until-cleared policy was well-documented in a report released by the Office of the Inspector General ("OIG") of the U.S. Department of Justice on June 2, 2003, entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." A copy of this report was appended to the Second Amended Complaint as Exhibit 1, and is incorporated by reference except where contradicted by the allegations of this Fourth Amended Complaint. It is also available at http://www.usdoj.gov/oig/special/0306/full.pdf.

ing Unit ("ADMAX SHU")—without any standards or procedures for making such a determination, or any information that they were dangerous or involved in terrorism. Others, like Abbasi, Bajracharya, Mehmood, and Khalifa, were placed in the ADMAX SHU even though they had not been classified "high interest" and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment. Although there are specific federal regulations for determining when to subject detainees to administrative or punitive detention, Defendants did not comply with these regulations in subjecting Plaintiffs and class members to this treatment.

5. At Passaic, the 9/11 detainees were kept from practicing their religion. While in the ADMAX SHU, the MDC Plaintiffs and class members were subjected to unreasonable and excessively harsh conditions. They were placed in tiny cells for over 23 hours a day and strip-searched, manacled, and shackled when taken out of their cells. They were physically and verbally abused by their guards. Many were badly beaten. The MDC Plaintiffs and class members were subjected to a communications blackout and other actions that interfered with their ability to communicate with the outside world, their access to counsel and their ability to seek redress in the courts. They were denied recreation and adequate hygiene supplies, and prevented from practicing their faith during their detention.[2]

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[2] This abuse was documented in a second OIG report, issued in December of 2003, entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York." The Supplemental Report was attached without appendices as Exhibit 1 to the Third Amended

6. By creating and implementing the policy to place MDC Plaintiffs and class members in unduly restrictive and punitive conditions of confinement, Defendants Ashcroft, Mueller and Ziglar violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution. By detaining Plaintiffs and class members in these conditions and ordering or condoning their abuse, Defendants Hasty, Zenk, Sherman, Lopresti, and Cuciti also violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution.

7. By arresting Plaintiffs and class members, detaining them under unreasonable and excessively harsh conditions Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Lopresti, and Cuciti also engaged in racial, religious, ethnic, and national origin profiling. Plaintiffs' and class members' race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement in violation of the rights guaranteed to them by the Fifth Amendment to the United States Constitution.

8. Plaintiffs seek compensatory and punitive damages for themselves and all class members, and an award of costs and reasonable attorneys' fees.

## JURISDICTION AND VENUE

9. This action is brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcot-*

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Complaint, and is incorporated by reference except where contradicted by the allegations of this Fourth Amended Complaint. It is also available at http://www.usdoj.gov/oig/special/0312/final.pdf.

*ics*, 403 U.S. 388 (1971), under the First, Fourth, and Fifth Amendments to the Constitution and 42 U.S.C. §1985(3).

10. This Court has jurisdiction under 28 U.S.C. §1331.

11. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

**JURY DEMAND**

12. Plaintiffs demand trial by jury in this action on each and every one of their claims.

**PARTIES**

**The MDC Plaintiffs**

13. Plaintiff AHMER IQBAL ABBASI is a South Asian Muslim, and a native and citizen of Pakistan. He currently lives in Pakistan with his wife and three children and works as a supervisor at a construction company. Abbasi has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

14. Plaintiff ANSER MEHMOOD is also a South Asian Muslim, and a native and citizen of Pakistan. He is Abbasi's brother-in-law. He currently lives in Pakistan with his father, wife, and four children. He has had difficulty finding work in Pakistan, and has had to rely on his father's financial support. Mehmood has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

15. Plaintiff BENAMAR BENATTA is an Arab Muslim, a native of Algeria, and has protected refugee status in Canada. Benatta has not been able to find

steady work since his detention in the United States. He currently lives in Canada and is pursuing a graduate degree in Aeronautics at the University of Toronto. Benatta has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

16. Plaintiff AHMED KHALIFA is an Arab Muslim, and a native and citizen of Egypt. He currently lives in Egypt with his parents. Khalifa is a doctor and works as a general practitioner. Khalifa has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

17. Plaintiff SAEED HAMMOUDA is an Arab Muslim, and a native and citizen of Egypt. He currently lives in Egypt with his mother. He is the owner and manager of a medical supplies company called ADVA-MED. Hammouda has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

18. Plaintiff PURNA RAJ BAJRACHARYA is a South Asian Buddhist, and a native and citizen of Nepal. He currently lives in Katmandu with his wife, sons, and daughters-in-law, and is retired. Bajracharya has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

**The Passaic Plaintiffs**

19. Plaintiff IBRAHIM TURKMEN is Muslim, and a native and citizen of Turkey, where he lives with his wife and four daughters. Turkmen has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

20. Plaintiff AKHIL SACHDEVA is a South Asian Hindu, and a native and citizen of India. He currently

lives in Canada. Mr. Sachdeva has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

**Defendants**

21. At all times relevant to this complaint Defendant JOHN ASHCROFT was the Attorney General of the United States. As Attorney General, Ashcroft had ultimate responsibility for the implementation and enforcement of the immigration laws. He is the principal architect of the policies and practices challenged here, and he directed his subordinates to implement them. Along with a small group of high-level government employees, Ashcroft created the hold-until-cleared policy and directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members. With that same group, he also created many of the unreasonable and excessively harsh conditions under which Plaintiffs and other class members were detained, and authorized others of those conditions. Ashcroft ordered the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Ashcroft is sued in his individual capacity.

22. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. Mueller was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members, and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. Mueller condoned the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those char-

acteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Mueller is sued in his individual capacity.

23. At all times relevant to the complaint Defendant JAMES W. ZIGLAR was the Commissioner of the INS. As INS Commissioner, Ziglar had immediate responsibility for the implementation and enforcement of the immigration laws. He was the INS' chief executive officer. Ziglar was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members, and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. Ziglar condoned the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Ziglar is sued in his individual capacity.

**The MDC Defendants**

24. Defendant DENNIS HASTY was the Warden of the MDC until the spring of 2002. While Warden, Hasty had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered the creation of the ADMAX SHU at the MDC for the purpose of confining Plaintiffs and other class members under unreasonable and excessively harsh conditions in violation of the Constitution. He allowed his subordinates to abuse MDC Plaintiffs and class members with impunity by ignoring some evidence of this abuse and avoiding other evidence—for example, by neglecting to make rounds on the

ADMAX unit as required by BOP policy. Despite his attempt to remain blind to the conditions experienced by MDC Plaintiffs and class members, Hasty was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts, and did not take any actions to rectify or address the situation. Hasty is sued in his individual capacity.

25. Defendant MICHAEL ZENK was the Warden of the MDC in the Spring of 2002 and after. As Warden, Zenk had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered that MDC Plaintiffs and other class members be confined in the ADMAX SHU of the MDC under unreasonable and excessively harsh conditions in violation of the Constitution. He also allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. He made rounds on the ADMAX and was aware of conditions there. Zenk is sued in his individual capacity.

26. At all times relevant to this complaint, Defendant JAMES SHERMAN was the MDC Associate Warden for Custody. Sherman assisted the other defendants in creating the unreasonable and excessively harsh conditions in the ADMAX SHU and allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there. Sherman is sued in his individual capacity.

27. At all times relevant to this complaint, Defendant SALVATORE LOPRESTI was the Captain of the MDC, and thus had responsibility for supervising all MDC correctional officers, including those who worked on the ADMAX. Lopresti was also responsible for overseeing the

ADMAX unit. Lopresti took part in creating the unreasonable and punitive conditions on the ADMAX unit at the request of Hasty. Lopresti was frequently present on the ADMAX Unit, regularly reviewed documentation of some of the abuses, and received numerous complaints from 9/11 detainees about abuse and mistreatment. Despite this information, he did not take any actions to rectify or address the situation. Lopresti is sued in his individual capacity

28. At all times relevant to this complaint, Defendant JOSEPH CUCITI was First Lieutenant at the MDC, and was the institution's coordinator with law enforcement officers who sought to interrogate the 9/11 detainees. In that capacity he was responsible for escorts, processing, attorney/client and social visits, and other aspects of the 9/11 detentions. Cuciti drafted MDC's policies regarding conditions in the ADMAX SHU and developed the policy for strip-searches on the ADMAX Unit. Cuciti made rounds on the ADMAX SHU and reviewed logs created by that unit; in those and other ways he heard complaints from MDC Plaintiffs and class members regarding the conditions and abuse described below, yet failed to take any steps to rectify that abuse. Cuciti is sued in his individual capacity

## CLASS ACTION ALLEGATIONS

29. Plaintiffs seek to represent a Plaintiff class consisting of all male non-citizens from the Middle East, South Asia and elsewhere who are Arab or Muslim, or were perceived by Defendants as Arab or Muslim, and who were:

a. arrested by the INS or FBI after the September 11, 2001 terrorist attacks and charged with immigration violations;

b. treated as being "of interest" to the government's terrorism investigation and subjected to a blanket "hold-until-cleared" policy pursuant to which they were held without bond, without evidence of dangerousness or flight risk, until cleared of terrorist ties by the FBI; and

c. detained at MDC or Passaic County Jail.

30. Plaintiffs and the other members of the class were subjected to the policies and practices described in paragraphs 1 through 7 of this Fourth Amended Complaint, and more fully hereafter.

31. The members of the class are too numerous to be joined in one action, and their joinder is impracticable, in part because Defendants kept their identities secret until long after they were deported from the United States. While the exact number is presently unknown to Plaintiffs' counsel, the Department of Justice Office of Inspector General was able to identify approximately 475 9/11 detainees who were held at MDC and Passaic and were subjected to the policies challenged in this action.

32. Common questions of law and fact exist as to all class members and predominate over questions that affect only the individual members. These common questions include:

a. whether Defendants adopted, promulgated, and implemented policies and practices depriving MDC Plaintiffs and class members of their liberty without due process of law in violation of the Fifth Amendment by subjecting them to outrageous, excessive, cruel, inhumane, and degrading conditions of confinement;

b. whether Defendants adopted, promulgated, and implemented a policy and practice of depriving Plaintiffs and class members of equal protection of the law in violation of the Fifth Amendment by placing them in restrictive conditions of confinement because of their race, religion, ethnicity, and/or national origin;

c. whether Defendants adopted, promulgated, and implemented a policy and practice which violated Plaintiffs' and class members' rights under the First Amendment to practice their religion.

33. Plaintiffs' claims are typical of those of the class for reasons that include the following:

a. each Plaintiff is a male non-citizen of Middle Eastern or South Asian descent who is Arab or Muslim, or was perceived by Defendants to be Arab or Muslim;

b. each Plaintiff was arrested and detained subsequent to the September 11 terrorist attacks and charged with minor (but deportable) immigration violations;

c. each Plaintiff was treated as "of interest" to the PENTTBOM investigation, and subjected to a blanket "hold-until-cleared" policy pursuant to which he was held in INS detention, without regard to evidence of danger or flight risk, until cleared of terrorist ties by the FBI;

d. each Plaintiff housed in MDC was held under unreasonable and excessively harsh conditions of confinement, and subjected to a communications blackout;

e. each Muslim Plaintiff was denied an opportunity to practice his religion; and

f. the race, religion, ethnicity and/or national origin of each Plaintiff (real or perceived) played a determinative role in Defendants' decision to detain him.

34. The legal theories on which Plaintiffs rely are the same or similar to those on which all class members would rely, and the harms suffered by them are typical of the harms suffered by the other class members.

35. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the class representatives are consistent with those of the class members. In addition, Plaintiffs' counsel are experienced in class actions and civil rights litigation.

36. Plaintiffs' counsel know of no conflicts of interest among class members or between the attorneys and class members that would affect this litigation.

37. Use of the class action mechanism here is superior to other available methods for the fair and efficient adjudication of the claims and will prevent the imposition of undue financial, administrative, and procedural burdens on the parties and on this Court which individual litigation of these claims would impose.

38. The Plaintiff class should be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure because common questions of law and fact predominate and a class action is a superior way to fairly and efficiently adjudicate the controversy.

## STATEMENT OF FACTS

### The Ashcroft Sweeps & the Hold-Until-Cleared Policy

39. Immediately after September 11, Ashcroft created and implemented a policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism. Under Ashcroft's orders, the round-up and detentions were undertaken without a written policy, to avoid creating a paper trail.

40. The FBI set up a tip line after September 11, and tips poured in from civilians across the nation. Within a week, 96,000 tips had been received, most of them based upon terrified citizens' discriminatory notions about Arabs and Muslims. Contrary to prior FBI practice, Mueller ordered that every one of these tips be investigated, even if they were implausible on their face, or based solely on suspicion of an individual due to his religion, ethnicity, country of origin or race.

41. While every tip was to be investigated, Ashcroft told Mueller to vigorously question any male between 18 and 40 from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile. FBI field offices were thus encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism. Mueller expressed reservations about this result, but nevertheless knowingly joined Ashcroft in creating and implementing a policy that targeted innocent Muslims and Arabs.

42. The FBI field offices followed this guidance in investigating Plaintiffs and class members. For example, the head of the New York FBI field office stated that an

individual's Arab appearance and status as a Muslim were factors to consider in the investigation. Another supervisor in the New York FBI field office who oversaw the clearance process stated that a tip about Russian tourists filming the Midtown tunnel was "obviously" of no interest, but that the same tip about Egyptians was of interest.

43. The resulting investigation focused on men who were Muslim and South Asian or Arab, or who were perceived as such. With a few exceptions, the detainees were almost entirely Muslim and South Asian or Arab. The few swept up for immigration violations during the PENTTBOM investigation who did not fit this profile were treated differently than Plaintiffs and class members. For example, five Israelis detained for allegedly celebrating on September 11 ended up at MDC, but they received legal and consular visits in early October, before anyone else in the unit, and they were among the first detainees to be moved from the ADMAX SHU to general population and dropped from the INS custody list, all without clearance letters from the FBI. Another detainee, who happened to be the roommate of an acquaintance of several of the hijackers, was also cleared quickly—within six weeks of his arrest; the FBI summary noted only his lack of relevance to the PENTTBOM investigation and that he was either Austrian or Australian. One detainee with a Spanish surname was picked up while investigators were following a lead about a Yemeni store owner, but determined to be of "no PENTTBOM connection" without any clearance investigation, or even the assignment of an investigator. Thus the New York FBI field office was authorized to release him without any clearance letter from FBI headquarters in contradic-

tion to the hold-until-cleared policy applied to Muslim, Arab and South Asian non-citizens.

44. In contrast, Muslim, Arab and South Asian non-citizens were treated as "of interest" to the PENTTBOM investigation without a determination by any FBI or other law enforcement officer that the non-citizen had engaged in any suspicious behavior, or identification of any reason to believe the individual had information about terrorism or was involved in the 9/11 attacks.

45. In the words of one high-ranking Department of Justice official, there was "custody without triage"—that is, without any attempt to sift out detainees of actual interest to the investigation from those who were not. There was, said the same official, "no clear vetting" of detainees, and he was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity. Similarly, Defendant Mueller told OIG investigators that he was not aware of any guidance or policy for determining whether a detainee was of special interest.

46. Several highly placed law enforcement officers, including the Assistant Director in Charge of the New York field office of the FBI, disagreed with this approach and challenged its implementation, arguing that law enforcement efforts must focus on individuals for whom the office had developed evidence were connected to terrorism. Their expertise was ignored.

47. Ashcroft, Mueller and Ziglar received detailed daily reports of the arrests and detentions and were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as "of interest" to the PENTTBOM investigation. Indeed, in October 2001 all three learned that the New York field

office of the FBI was keeping a separate list of non-citizens, including many Plaintiffs and class members, for whom the FBI had not asserted any interest (or lack of interest). Against significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members be detained until cleared and otherwise treated as "of interest." Mueller and Ziglar were fully informed of this decision, and complied with it.

48. Ashcroft, Mueller, and Ziglar's decision to hold these hundreds of non-citizens for criminal investigation without evidence of any ties to terrorism was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them.

49. Pursuant to this policy, the FBI directed the INS to arrest and detain well over 1,200 male non-citizens from the Middle East, South Asia, and elsewhere who appeared to be Arab or Muslim, including Plaintiffs and class members, on minor immigration violations—such as overstaying visas, working illegally on tourist visas, or failing to meet matriculation and/or course work requirements for student visas.

50. While the INS had previously sought to remove non-citizens for these violations, it generally did not detain them during their removal proceedings.

51. The Immigration and Nationality Act ("INA") provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." INA §236(a); 8 U.S.C. §1226(a). However, only non-citizens with certain crimi-

nal convictions fall within the INA's "mandatory detention" provision. INA §236(c); 8 U.S.C. §1226(c). Plaintiffs squarely fall within the discretionary detention statute, and therefore must be provided an individualized custody determination by the Service and, if requested, by an Immigration Judge. The INS took a different approach with Plaintiffs and class members, not because they violated the immigration laws—that alone does not justify de facto mandatory immigration detention—but rather because Ashcroft, Mueller and Ziglar categorized them as potential (although not actual or even probable) terrorists based on vague suspicions rooted in racial, religious, ethnic, and/or national origin stereotypes rather than in hard facts.

52. Many 9/11 detainees were held for weeks or months in INS facilities, federal detention centers, or county jails, without any charges being filed against them and without any hearing on the reasons for their detention. Eventually, the INS filed civil charges against most 9/11 detainees, alleging minor immigration violations. In the months to come, some detainees were also charged with minor criminal offenses related to their immigration violations, like possession of a fraudulent social security card.

53. Because the FBI lacked probable cause to hold Plaintiffs and class members on criminal charges, Ashcroft ordered Mueller and Ziglar to use the immigration law as a pretext to detain the 9/11 detainees while investigating them for potential ties to terrorism. Although Plaintiffs and class members were purportedly being held under the authority of the civil immigration law, Ashcroft placed Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division, in charge of the round-ups.

54. After immigration hearings, Plaintiffs and class members received final removal orders or accepted voluntary departure orders. Even though the INS could have promptly secured the removal or voluntary departure of these individuals, it kept them in custody for up to five months or more after the issuance of their final immigration orders—far longer than necessary to secure their departure from the United States, and well beyond the time that the INS is statutorily authorized to detain them. 8 U.S.C. §1231(a)(1) (90-day removal period); 8 U.S.C. §1229c(b)(2) (60-day period for voluntary departure granted at the conclusion of removal proceedings).

55. Plaintiffs and class members were kept in custody after the issuance of final removal or voluntary departure orders pursuant to Ashcroft's order that all non-citizens encountered during the PENTTBOM investigation be held in custody until they received a "clearance" from the FBI absolving them of any link to terrorists or terrorist activities. FBI clearances frequently took four months or longer. Ziglar, although concerned that the detentions overstepped the INS's statutory authority, complied with this requirement. So did Mueller. Ashcroft, Mueller, and Ziglar implemented this policy because of the same race, religion, and national origin stereotypes that prompted them to detain Plaintiffs in the first place.

56. These policies were created at the highest levels of Government, and their implementation was closely overseen by Ashcroft, Mueller, and Ziglar. Initially, the PENTTBOM investigation, consistent with FBI policy, was run out of the FBI field offices. But shortly after September 11, Mueller changed that policy, and ordered that the investigation would be run out of FBI Headquarters, under his direct control. The nerve center of

the 9/11 investigation was the Strategic Information and Operations Center, called SIOC, at FBI Headquarters.

57. Mueller personally directed the investigation out of SIOC for the FBI and was in daily contact with the FBI field offices regarding the status of individual clearances. Even after the New York field office of the FBI determined that a Plaintiff or class member had no connection to terrorism, Mueller would not authorize that person to be "cleared" until Headquarters reviewed and signed off on the details of the investigation and received a completed name trace from the Central Intelligence Agency ("CIA"). Many 9/11 detainees, including all of the MDC Plaintiffs, were cleared by the New York field office of any connection to terrorism and then detained for months in restrictive confinement while Headquarters considered their cases. Concerns expressed by FBI field office personnel about this delay were ignored by Headquarters. Mueller made this change because of the same race, religion, and national origin stereotypes that prompted him to detain Plaintiffs in the first place.

58. As a matter of policy and practice, and in keeping with its "hold-until-cleared" policy, the INS did not conduct post-order custody reviews for 9/11 detainees held more than 90 days after their final removal orders. These reviews are required by the INS regulations at 8 C.F.R. §241.4, and provide that detainees must be given 30 days' notice of the review and that the INS must complete the review 90 days after the issuance of a final removal order. Plaintiffs and class members were not given notice of such a review and no such review was conducted.

59. No one told Plaintiffs and class members why they had been singled out for prolonged investigation and denied custody reviews. Many were told they would be

deported shortly after they received final orders, as required by the immigration law. Months passed and they remained in custody, leading them to believe they might be held forever.

60. Ashcroft, Mueller and Ziglar adopted, promulgated, and implemented these detention policies based on invidious animus against Arabs and Muslims, in violation of the First and Fifth Amendments to the Constitution. Evidence of this invidious animus includes:

a. there was no non-discriminatory reason to hold Plaintiffs and class members for investigation, yet Ashcroft, Mueller, and Ziglar delayed their deportation and placed them in restrictive confinement anyway;

b. these unconstitutional detention policies have not been applied to all noncitizens in the United States alleged to have violated the immigration laws;

c. the few individuals arrested in the sweeps who did not fit this profile were cleared quickly, or moved into general population without clearance;

d. Plaintiffs and class members were verbally abused and subjected to statements slandering the Muslim faith and their adherence to it by the Defendants, including Ashcroft, who expressed anti-Muslim sentiments, including a statement identifying Christianity by its central theological tenet, but Islam, in contrast, by the views of a small group of extremists: "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.";

e. Plaintiffs and class members were targeted for disparate treatment by Ashcroft, who announced the policy that Plaintiffs and class members would be arrested and detained for any reason regardless of the de minimis nature of their infractions, and thereby eliminated for Plaintiffs and class members any access to the fair and reasonable discretion of law enforcement officials. This fair and reasonable discretion remained available to non-Arab and non-Muslim individuals who were non-citizens. Defendant Ashcroft's policy announcement stated: "Let the terrorists among us be warned. If you overstay your visa even by one day, we will arrest you. If you violate a local law we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible." Although Ashcroft referred in this statement to "terrorists," it describes the policy he applied to Arab and South Asian Muslims with no connection to terrorism.

f. Consistent with Defendant Ashcroft, Mueller and Ziglar's personal bias against Muslims, South Asians, and Arabs, the Defendants also directed the Department of Justice to engage in the following policies, not challenged by this lawsuit, but also based entirely on suspicion of individuals because they belonged to these particular groups: (1) The Absconder Apprehension Initiative, which was designed to "locate, apprehend, interview, and deport" approximately "several thousand" individuals from predominantly Muslim countries. See Memorandum, the Deputy Attorney General,

U.S. Dep't of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002); (2) Mandatory detention for asylum seekers from Arab and South Asian nations. See http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet12.htm; (3) Special registration, which requires aliens from Arab and South Asian countries, almost all of which are predominantly Muslim, to report to immigration authorities to be fingerprinted and photographed, and often interrogated and detained. See Registration of Certain Nonimmigrant Aliens From Designated Countries, 68 Fed. Reg. 8046 (Feb. 19, 2003); 68 Fed. Reg. 2363 (Jan. 16, 2003); 67 Fed. Reg. 77,642 (Dec. 18, 2002); 67 Fed. Reg. 77,136 (Dec. 16, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 57,032 (Sept. 6, 2002); (4) According to sources within the Department of Justice, Ashcroft also ordered the INS and FBI to investigate individuals with Muslim-sounding names from vast sources of data, including INS records of entering noncitizens, as well as the phonebook.

**Conditions of Confinement & Abuse**

61. In the first few months after 9/11, Ashcroft and Mueller met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation, including Plaintiffs and class members. The group discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread

the word among law enforcement personnel that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate.

62. Commissioner Ziglar was at many of these meetings, and he discussed the entire process of interviewing and incarcerating out-of-status individuals with Ashcroft and others.

63. Ashcroft insisted on regular, detailed reporting on arrests. He wanted precise numbers, and received a daily Attorney General's Report on persons arrested and other developments of interest. He used this report for daily briefings of the President and the National Security Council on the progress of the investigation.

64. Ziglar was ultimately responsible for providing much of this information to Ashcroft, and had twice daily briefings with his staff regarding the 9/11 detentions.

65. The punitive conditions in which MDC Plaintiffs and class members were placed were the direct result of the strategy mapped out by Ashcroft and Mueller's small working group. These conditions were formulated in consultation with the FBI, and designed to aid interrogation. Indeed, sleep deprivation, extremes of temperature, religious interference, physical and verbal abuse, strip-searches, and isolation are consistent with techniques developed by the C.I.A. to be utilized for interrogation of "high value detainees."

66. There were not enough secure beds in federal jails like MDC to hold all the 9/11 detainees, so Ashcroft, Mueller and Ziglar's orders to encourage the 9/11 detainees to cooperate were implemented differently for the Passaic Plaintiffs and class members. Passaic Plaintiffs were denied the ability to practice their

religion, were held in overcrowded general population units with convicted felons, and were subjected to physical and verbal abuse, including being menaced by dogs. However, they were not held in isolation or otherwise placed in restrictive confinement.

67. Ashcroft, Mueller and Ziglar knew that the FBI had not developed any reliable evidence tying Plaintiffs and class members to terrorism, yet authorized their prolonged detention in restrictive conditions nonetheless. Indeed, Mueller ordered that MDC Plaintiffs and class members be kept on the INS Custody list (and thus in the ADMAX SHU) even after local FBI offices reported that there was no reason to suspect them of terrorism. For Mueller, the absence of suspicion was not enough; the CIA, which had no role in arresting class members or designating them "of interest," had to be asked if it could find some basis for suspicion.

68. To implement Ashcroft, Mueller and Ziglar's policy, Wardens Hasty and Zenk ordered their subordinates to ignore BOP regulations regarding detention conditions. BOP regulations limit the circumstances in which detainees may be placed in the SHU and require an employee known as the Segregation Review Official to conduct a weekly review of the status of each inmate housed in the SHU after he has spent seven days in administrative detention or disciplinary segregation. The Segregation Review Official is also required to conduct a formal hearing every 30 days assessing the inmate's status. These review processes were not conducted for the 9/11 detainees. Instead, Wardens Hasty and Zenk ordered prolonged placement of MDC Plaintiffs and class members in the ADMAX SHU without following the processes they knew the law required for such deprivation. Reports for 9/11 detainees in MDC's

ADMAX SHU were automatically annotated with the phrase "continue high security," and no hearing took place. Plaintiffs and class members were thus denied a fair review process in which to challenge their conditions of confinement.

69. MDC Defendants were aware that the FBI had not developed any information to tie the MDC Plaintiffs and class members they placed in the ADMAX SHU to terrorism. On a regular basis, an MDC intelligence officer received print-outs of the FBI and INS's 9/11 detainee lists and databases so that he could update Hasty, Sherman, and Lopresti about the investigations. These regular written updates included summaries of the reason each detainee was arrested, and all evidence relevant to the danger he might pose to the institution. Hasty, Sherman and Lopresti shared the information with Cuciti and other MDC staff.

70. The updates demonstrated the dearth of information connecting MDC Plaintiffs and class members to terrorism or raising a concern that they might pose a danger to the facility. For example, with respect to Khalifa, MDC Defendants were informed only that he was arrested because he was "encountered by INS" while following an FBI lead and charged with a violation of the INA. They were further informed that Khalifa had no INS applications, petitions or extensions pending, and that the "FBI may have an interest" in him. No other information was provided. As the briefing was designed to alert MDC staff to all information relevant to the question of whether Khalifa posed a security threat to the institution, the lack of any specific or incriminating information put MDC Defendants on notice of the inappropriateness of holding all 9/11 detainees in restrictive confinement without individualized assessments.

71. Similarly, MDC Defendants were informed that Mehmood was arrested because he was "encountered" by federal agents while executing a search warrant pursuant to an FBI lead; that his residence contained documents related to fraudulent Pakistan passports, credit card fraud, and "other criminal violations"; that he was charged with a "B1 [visa] overstay," and that he was in possession of fraudulent Social Security cards. The update included no statement of FBI interest in Mehmood.

72. MDC Defendants were informed that Abbasi was "encountered" by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi.

73. The exact language of these updates was repeated weekly, indicating the continued lack of any information tying Khalifa, Mehmood, or Abbasi to terrorism, or tending to show that any of them might pose a danger. Despite this clear demonstration that the FBI had no information to connect the 9/11 detainees to terrorism or suspect them of dangerousness, Hasty, Sherman, and Lopresti continued to hold all the MDC Plaintiffs and class members in restrictive and punitive confinement, without undertaking the required individualized assessment of whether each individual posed a danger to the facility or otherwise required close supervision.

74. Hasty, Sherman, Lopresti, and Cuciti were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerous-

ness or risk was unlawful; thus, Lopresti signed a document that was prepared by Cuciti, and approved by Hasty and Sherman, which untruthfully stated that the executive staff at MDC had classified the "suspected terrorists" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." In reality, none of the MDC Defendants saw or considered information in any of these categories in deciding to place the 9/11 detainees in the ADMAX SHU. Indeed, after a few months of interacting with MDC Plaintiffs and class members, the MDC Defendants realized that they were not terrorists, but merely immigration detainees. Nevertheless, the restrictive conditions and harsh treatment continued.

75. To carry out Ashcroft, Mueller and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment designed to obtain their cooperation, Hasty ordered Lopresti and Cuciti to design extremely restrictive conditions of confinement. These conditions were then approved and implemented by Hasty and Sherman, and, later, by Zenk.

76. As a result, detention in the ADMAX SHU entailed severe deprivations of liberty beyond those authorized by the BOP for administrative or disciplinary segregation. An ADMAX SHU is a particularly restrictive type of SHU not found in most BOP facilities because the normal SHU is usually sufficient for correcting inmate misbehavior and addressing security concerns. Indeed, the only other ADMAX SHU in existence at the time of Plaintiffs' detentions was the BOP's high security unit in Florence, Colorado, where the most dangerous convicted criminals are held. The ADMAX SHU at MDC was established after September 11, 2001

to make available more restrictive confinement. Unlike the regular SHU, in the ADMAX SHU detainees were handcuffed, shackled, chained, and accompanied by four guards whenever they left their cell, which was only permitted for extremely limited purposes. Two cameras were placed in each cell to monitor each inmate 24 hours a day, hand-held cameras recorded their movements whenever they left their cells, and the lights were left on 24 hours a day. Unlike detainees in the general population at MDC, detainees in the ADMAX SHU were detained in their cell for at least 23 hours a day, and were not allowed to move around the unit, use the telephone freely, or keep any property, even toilet paper, in their cell. MDC Plaintiffs and class members were subjected to these restrictive conditions in the ADMAX SHU for between three and eight months pursuant to a written policy drafted by Cuciti, signed by Lopresti, and approved by Sherman and Hasty, and subsequently by Zenk.

77. Further, Hasty facilitated his subordinates' multifaceted abuse of MDC Plaintiffs and class members by referring to the detainees as "terrorists," purposely avoiding the ADMAX unit, and isolating them from any avenue of complaint or assistance. All the MDC Defendants allowed Plaintiffs and class members to be beaten and harassed by ignoring direct evidence of such abuse, including logs and other official documents, videotapes, and detainee complaints. MDC Defendants used the harsh detention conditions as an intentional means of punishing, harassing, and "breaking" the MDC Plaintiffs and class members.

78. When a few MDC staff members brought allegations of abuse to the attention of Hasty and other senior MDC officials, they were called snitches, threat-

ened, and subjected to harassment by many other staff members at the facility. The campaign of harassment was so pervasive that one MDC employee estimated that half of the staff at MDC stopped speaking to him after he wrote a confidential memo to the Warden detailing detainees' complaints that was then distributed to the staff members on the ADMAX unit. The harassment went unpunished.

## COMMUNICATIONS BLACKOUT AT MDC

### Policy to Hold Detainees Incommunicado

79. Hasty implemented Ashcroft, Mueller, and Ziglar's explicit policy to limit MDC Plaintiffs' and class members' access to the outside world in several different ways. First, the 9/11 detainees were subjected to a communications blackout. MDC written policy (created by Lopresti and Cuciti, and approved by Hasty and Sherman) stated that the 9/11 detainees were not to be provided any social or legal visits or telephone calls. This blackout lasted until mid-October.

80. At the same time, individuals who sought to contact MDC Plaintiffs and class members were rebuffed. The arrest, processing, and detention of the 9/11 detainees were shrouded in secrecy. Family members, friends, and attorneys of men who had suddenly disappeared had great difficulty finding out whether they had been arrested and detained, and if so, where they were being held. Once they were classified as "special interest cases," 9/11 detainees' immigration hearings were closed, not only to the general public, but also to family members, and their case records were sealed.

81. MDC Plaintiffs and class members were classified within the BOP as "WITSEC" (Witness Security). The WITSEC designation is intended to protect cooperating

witnesses from reprisal, and operates to prohibit BOP staff from disclosing to any individual, even a family member or lawyer, the designee's location. Based on the WITSEC designation, MDC staff repeatedly turned away any relative or lawyer who came to the MDC in search of a detainee by falsely stating that the detainee was not there.

82. For example, after Mehmood was arrested, his wife Uzma tried to find out what was going on by visiting the local police department, and calling the FBI. The FBI told her that Mehmood was in INS custody and gave her a phone number to call to ascertain Mehmood's location. When she called the INS, however, they would not tell her where her husband was being held. Eventually, she hired a lawyer who learned that Mehmood was being held at MDC. But even with the help of counsel, she was unable to communicate with her husband for three months.

**Post-Blackout Restriction on Communication and Access to Counsel**

83. Beginning around the middle of October 2001, MDC Plaintiffs and class members were theoretically permitted non-contact visits and telephone calls. By MDC policy, they were allowed one call per week to an attorney and one social call per month. In practice, they were frequently denied even these limited calls.

84. In many instances, the unit counselor inquired whether 9/11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "Are you okay?" Many detainees did not realize that an affirmative response to this casual question meant they opted to forgo their legal call for that week.

85. When MDC Plaintiffs and class members were actually offered calls, an MDC employee would bring a phone to each cell, often before offices opened for business, and each inmate who requested a phone call was required to place a call request form outside of his cell. Often, the officers would pretend to dial a number, or deliberately dial the wrong number and then claim that the line was dead or busy. They would then refuse to dial again, saying the call failed to go through and that the detainee had exhausted his quota of calls for the week or month. Legal calls that resulted in a wrong number, busy signal or calls answered by voicemail counted as their one legal call for that week. According to MDC documents, Hammouda, for example, was not able to make a legal call until November 7, and it appears the call was unsuccessful, as the records indicate it lasted only two minutes. His next opportunity was November 19, and when that call was incomplete, he was not given another opportunity until November 27. His call on that day lasted only five minutes. Similarly, Abbasi attempted a legal call on December 17, but it was incomplete. MDC records show that he did not try again until February 12, when he made a call that lasted three minutes. Khalifa made a legal call on October 15, but did not receive another opportunity until November 7. Bajracharya was not aware that he could make a legal call until December 3, 2001. On December 17, 2001 he again attempted to make a legal call, but MDC records show the call was incomplete. He did not get another opportunity until January 4, 2002, at which point MDC records show that he made a phone call lasting two minutes.

86. Once the MDC Plaintiffs and class members were permitted social calls at MDC, in or about the middle of

October 2001, these, too, were severely restricted in the same ways. Mehmood, for example, was not able to get through to his wife for three months, because the MDC employee responsible for providing phone calls counted an attempted call, even one that did not go through for technical reasons, as the one monthly call. Hammouda received his first social call on December 18. Abbasi was offered a social call for the first time on October 19, but the number he wanted to call was not on his inmate list, and thus he lost his opportunity to make any call that month. His next opportunity to make a social call was on November 13, but the call was not accepted. He didn't get another chance until December 26. Khalifa tried unsuccessfully to make a call on October 19, and did not try again until December 10. That attempt was also unsuccessful. Bajracharya was first able to attempt a social call on December 18, but that attempt was unsuccessful. Indeed, MDC records indicate that he was only able to complete one social call in his entire time at MDC, and that call lasted 4 minutes. MDC records show that Khalifa did not have a single successful social call. Benatta was only ever able to get through to an answering machine.

87. MDC Plaintiffs and class members were so upset by their lack of access to the outside world that many went on hunger strike to protest the situation, and one class member attempted suicide by strangling himself with his bed sheet.

88. Legal and social visits were non-contact; a detainee was separated from his visitor by thick plexiglass. Despite the lack of contact, MDC Plaintiffs and class members were cuffed and shackled throughout the visit, and strip-searched both beforehand and afterwards. Social visits were restricted to immediate family. Thus,

Abbasi, Benatta, Bajracharya and Khalifa never received a single social visit throughout their imprisonment on the ADMAX.

89. December 17, 2001 was Eid, the Muslim holiday that marks the end of the Ramadan fast. Mehmood's wife and children went to MDC to visit him, but were told he was not there. They left without being able to see Mehmood, or deliver to him the prayer rug and food they had brought. Mehmood's wife was finally granted a non-contact visit on January 11, 2002. Mehmood's children were not allowed to visit until he was moved to the general population at MDC in February 2002.

90. Hammouda's wife had a similar experience. Twice she was turned away and told her husband was not at MDC. On another occasion she arrived at MDC at the time she had been instructed she could visit, and was told visiting hours were over. These troubles continued throughout the spring of 2002.

91. Demonstrations protesting the treatment of 9/11 detainees were held weekly outside the MDC starting in November, but the ADMAX SHU cell windows were painted over to keep the detainees from seeing the protestors.

92. The MDC Plaintiffs and class members were not provided with sufficient information to obtain legal counsel. Immigration detainees typically receive a list of organizations that provide free legal services, but the list given to 9/11 detainees was woefully inadequate, containing much inaccurate and outdated information. The MDC Plaintiffs and class members had great difficulty obtaining legal representation, and some were held for months following their arrest while their lawyers

and their families made unsuccessful requests to learn their status and whereabouts.

93. Abbasi tried to secure counsel by calling names on the list of pro bono counsel provided by the facility, but got no response. He finally managed to contact his sister, Uzma, after about three months in detention. She arranged to secure an attorney to represent him with respect to his criminal charges. Once he retained an attorney, he was able to call that attorney for two to three minutes at a time, although MDC personal remained within hearing distance of his conversation at all times. He was not able to meet with an attorney until December 28, 2001. Khalifa's first legal visit was on November 1, 2001. The attorney he met with told him she would be at his immigration hearing, but when the time came, she was not present. He was unable to reach her after that. He tried calling some of the numbers on the pro bono counsel list, but was unable to reach anyone.

94. Some MDC Plaintiffs found their access to counsel blocked even during immigration hearings. Mehmood had a hearing before an immigration judge at MDC on October 16. When he explained to the judge that he had been unable to contact a lawyer, the judge postponed the hearing until October 25, 2001.

95. Benatta also had to attend an immigration hearing without a lawyer. In fact, he didn't even know he was going to have a hearing until he was ordered out of his cell by MDC guards and taken before an immigration judge. During that hearing, Benatta complained to the immigration judge about how tightly he was restrained, so the judge asked the corrections officers to check him during a break. The guards pulled Benatta's chains even tighter, and asked him if he wanted to complain again. Benatta also told the immigration judge that he was

being denied phone calls. Word of his complaint got back to MDC staff, and resulted in even more restricted access.

96. While civil liberties, civil rights, and immigrant advocacy organizations sought to provide free legal services to 9/11 detainees, the MDC substantially limited such organizations' access to 9/11 detainees by order from DOJ headquarters, in keeping with Ashcroft, Mueller and Ziglar's policy to isolate the detainees. MDC employees as well as others within the BOP and INS refused to disclose detainees' names, the facilities in which they were held, or information about their cases. They also denied requests by civil liberties, civil rights, and immigrant advocacy organizations to visit BOP facilities or county jails to screen 9/11 detainees in need of legal assistance. These requests were considered and rejected at Main Justice.

97. These unnecessary restrictions led to repeated complaints by 9/11 detainees, some of which were brought to the attention of Hasty, Zenk, Sherman, Lopresti, and Cuciti. The interference was also documented in legal call and social call logs prepared by MDC staff for review by Hasty, Zenk, Sherman, and Lopresti.

**Video and Audio Taping Attorney/Client Conversations**

98. In deliberate violation of the law, Hasty ordered his subordinates, including the other MDC Defendants, to audiotape detainees' visits with their attorneys. Such recording of inmates' meetings with attorneys (which was done by using a videotape camera that also recoded [*sic*] sound) is specifically prohibited by 28 C.F.R. § 543.13(e), which provides, "Staff may not subject visits between an attorney and an inmate to auditory supervision."

99. Recording the detainees' attorney visits was not necessary for the MDC's security purposes. It violated the law and interfered with the detainees' access to effective assistance of counsel. Through April 2002 or later, attorney visits were recorded with sound. Repeatedly throughout November and December, MDC staff brought to Hasty's attention the fact that "silent witness" cameras might be substituted for audio-ready cameras, but this advice was not heeded.

**Policy to Deny Detainees Access to Consuls**

100. The WITSEC designation and communications restrictions also made it difficult for consulates to contact detainees who were citizens of their countries.

101. Though non-citizen immigration detainees must be advised of their right to seek assistance from their consulates under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77, many Plaintiffs and class members were not advised of this right. Others were coerced into signing forms they did not understand, waiving that right. When the MDC Plaintiffs and class members sought to contact their consulates, their requests were repeatedly denied by the MDC Defendants.

102. For example, Hammouda was not informed that he had the right to have his consulate told about his detention until June 2002. At one point, he tried to call his consulate, but the number provided to him by MDC staff was incorrect. Abbasi was never informed of his right to call his consulate. While at the INS's Varick Street detention facility, he asked to speak to a lawyer or his consulate, but was not allowed to do so.

**INHUMANE CONDITIONS OF CONFINEMENT AT MDC**

103. Confinement in the ADMAX SHU subjected the MDC Plaintiffs and class members to a system of conditions designed to make their lives difficult and painful, not for any legitimate penological reason but in the belief that they were probably terrorists who therefore ought to suffer, and in the hopes that this suffering would lead to their cooperation with law enforcement. These conditions included confinement to bare cells virtually 24 hours a day; denial of recreation; deprivation of sleep; arbitrary strip-searches; chains, handcuffs and leg cuffs, coupled with twisting their hands and arms and stepping on their leg chains, whenever they left their cells; constant insult; denial of a chance to practice their religion; and lack of access to the prison handbooks that explained how to file complaints about such mistreatment.

**Restraints and Abuse**

104. During transport between the MDC Receiving and Discharge Area ("R&D Area") and the ADMAX SHU on the ninth floor of the MDC, 9/11 detainees at the MDC were fully restrained in metal handcuffs attached to a waist chain that was connected to another chain linked to ankle cuffs. Similarly, during routine escorts on the ADMAX SHU, the detainees were handcuffed behind their backs and their ankles were shackled. When they were escorted to visits, interviews, or out of the MDC, the detainees were handcuffed in front, restrained in a waist chain, and placed in leg restraints. The MDC Defendants subjected all MDC Plaintiffs and class members to such restraints routinely, as a matter of policy. In addition, MDC Defendants kept all MDC Plaintiffs and class members confined to their cells for

nearly 24 hours a day almost every day while they were housed in the ADMAX SHU.

105. Physical abuse of the MDC Plaintiffs and class members during transport was routine. Abuse was more flagrant before the MDC began videotaping detainee escorts in early October 2001, but continued even after that time, and included:

a. Slamming detainees against walls during escorts, including when they first arrived and on the way to attorney and doctor visits and recreation. Upon arrival to the MDC, staff slammed 9/11 detainees against the wall and pushed their faces into a t-shirt hanging on the wall which displayed the slogan "These Colors Don't Run" and the American flag.

b. Bending or twisting detainees' arms, hands, wrists, and fingers.

c. Lifting detainees off the ground by their arms, and pulling on their arms and handcuffs.

d. Stepping on detainees' leg restraint chains, both while stationary and while walking.

e. Using physical restraints as a form of punishment by leaving them in a cell in restraints for no proper penological purpose.

f. Handling detainees in various other rough and inappropriate manners.

106. Plaintiffs and class members were always fully compliant, making any use of force unnecessary and against BOP policy. Incidents of detainee misconduct were rare, and included only peeling paint off walls, injuring themselves, hiding from cameras, or refusing to come to the cell door to be handcuffed.

107. Numerous complaints about abuse of 9/11 detainees at MDC led the BOP to institute a policy of videotaping all 9/11 detainee movements and resulted in two OIG investigations, as well as investigations by the BOP Office of Internal Affairs and the FBI. Despite his awareness of these complaints and investigations, Hasty failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the tapes for abuse. Many of these tapes were destroyed, disappeared, or were taped over, and others were withheld from the OIG for years before they were "found" by MDC staff.

108. Typically, medical staff failed to examine or even comment on injuries the 9/11 detainees received from staff, or to ask how they occurred. MDC Plaintiffs and class members were never given an opportunity to speak to medical personnel outside the hearing of the correctional officers who abused them; these officers sat in on medical consults, and on occasion even assisted the doctors. It was the practice of the medical staff not to report abuse by correctional officers, and the MDC Plaintiffs and the class members often did not ask for doctors when they were abused for fear of retaliation by those officers.

109. MDC staff verbally abused Plaintiffs and class members by referring to them as "terrorists," and other offensive names; threatening them with violence; cursing at them; insulting their religion; and making humiliating sexual comments during strip-searches. These instances of abuse were themselves the result of Hasty labeling the detainees as "terrorists" in MDC memoranda despite the lack of any connection between class members and terrorist activity.

110. Some MDC Plaintiffs and class members complained about this abuse. For example, on February 11, 2002, Hammouda and several other class members complained to the MDC counselor that MDC staff called them "camel," gave them the finger, and assaulted them. No action was taken on these complaints. The counselor who reported the complaint to the Warden was ostracized and harassed.

**Arbitrary and Abusive Strip-Searches**

111. While Defendant Cuciti was given responsibility for developing the strip-search policy on the ADMAX, that policy was never put in writing, and the searches were conducted inconsistently.

112. 9/11 detainees were strip-searched upon arrival to MDC at the R&D Area and again after they had been escorted, in handcuffs and shackles and under continuous guard, to the ninth floor ADMAX SHU. Some of the same officers who were present for a detainee's strip-search in R&D were present for the detainee's strip-search on the ADMAX SHU. Detainees were strip-searched every time they were removed from or returned to their cell, including before and after meeting with a lawyer, receiving medical care, attending a court hearing within the MDC, or being transferred to another cell. These strip-searches occurred even when they had no conceivable opportunity to obtain contraband, such as before and after non-contact attorney visits which they had been escorted to and from while handcuffed and shackled and under continuous four-man guard, and before and after being transferred directly from one cell to another. For example, on October 25, 2001, Mehmood had an immigration hearing and a noncontact legal visit at MDC. Thus, he was strip-searched four times that day. Similarly, Benatta was strip-searched both before

and after an FBI interview, even though he was transported in full restraints by five MDC staff members from his locked cell to the bare FBI interview room and back without the opportunity to receive contraband. The strip-searches had no rational relation to any legitimate penological objective.

113. At other times 9/11 detainees were subjected to random strip-searches, despite remaining within their locked cells without opportunity to receive contraband. For example, MDC records indicate that Benatta was strip-searched on September 23, 24, and 26 of 2001, although he was not transported out of his cell on any of those days.

114. Many, though not all, of these illegal strip-searches were documented in a "visual search log" created by MDC staff for review by MDC management, including Hasty. Other illegal searches were captured on videotape.

115. Strip-searches were employed by MDC staff as punishment and used to humiliate the MDC Plaintiffs and class members, using such tactics as having female officers present, videotaping the strip-searches against BOP policy, strip-searching detainees unnecessarily and within view of other prisoners and staff, and making jokes and humiliating comments during strip-searches. On one occasion, a guard arrived in the middle of one of Benatta's strip-searches, and joked with the other guards about how they should have let him know Benatta was being searched, so he could have been there for all of it. Another time, a female officer watched Benatta's search. For Hammouda, the searches were so traumatizing and humiliating that they ruined the few visits he was able to have with his wife. He was searched before and after seeing her, and officers made derogatory statements

about his body and otherwise harassed him. Some of these searches were videotaped. The process made him feel damaged before talking to his wife, and rendered him anxious and depressed both before and after the visits. It was so bad that Hammouda considered telling his wife not to visit.

116. Many strip-searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked, contrary to BOP regulations that required strip-searches to "be made in a manner designed to assure as much privacy to the inmate as practicable." One MDC videotape shows four officers escorting a 9/11 detainee into a recreation cell and ordering him to strip while the officers berate him for talking too much with other detainees and for encouraging them to go on a hunger strike. The detainee had just been taken from his cell, pat-searched, and then escorted into the recreation cell by the four officers. There was no correctional purpose or justification for this strip-search.

117. On another occasion, MDC staff were ordered to strip-search all 9/11 detainees without suspicion or any opportunity to receive contraband in order to check to see if they had shaven genitalia, based on the mistaken belief that Muslims shave their genitals prior to performing jihad. In fact, Muslims commonly shave their bodies for religious and hygienic reasons.

118. The strip-searches caused all of the MDC Plaintiffs and class members embarrassment and humiliation.

**Sleep Deprivation**

119. Until March 2002, bright lights were kept on in the cells of MDC Plaintiffs and class members 24 hours a day, depriving them of sleep. Prison rules forbade det-

ainees to cover their heads while lying in bed at night, so there was no escape from the constant light. In addition, officers banged loudly on their cell doors to wake them up, interrupt their prayers, or generally harass them; sometimes this noise-making took place during required inmate counts at midnight, three and five a.m., but on other occasions it was without this excuse.

120. MDC staff have defended much of the noise as a necessary byproduct of "bar taps," a safety procedure in which correctional personnel use a mallet to tap on each bar in the facility weekly to produce a noise and check for stress or damage. MDC documents show that contrary to past MDC practice, bar taps on the ADMAX unit were conducted twice a night, in the middle of the night. On some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." Officers would also watch the in-cell cameras and kick on the doors as soon as they thought a detainee was asleep.

121. All the MDC Plaintiffs and class members experienced sleep deprivation, causing substantial physical and emotional distress. They complained repeatedly to officers, MDC management, and medical personnel, yet received no relief. On one occasion, Hammouda complained that he couldn't sleep at night, and was given a sheet of paper advising him to avoid coffee.

**De Facto Denial of Recreation; Inadequate Clothing and Exposure to the Elements**

122. Until October 30, 2001 MDC Plaintiffs and class members were denied all recreation. After October 30,

Plaintiffs and class members were offered "recreation" in empty cages on the ADMAX range. The cages were devoid of any exercise equipment and open to the sky. Thus they were exposed to the elements, including rain and, in the winter, snow and freezing cold. The MDC Plaintiffs and class members were often offered transport to these recreation cells at the early hour of six or seven a.m., but denied any extra clothing besides their light cotton prison garb, and, during the dead of winter, a light jacket. Detainees who accepted these offers were often physically abused along the way by MDC officers who escorted them and were sometimes left for hours in the cold recreation cell, over their protests, as a form of punishment.

123. Thus, while "recreation" was nominally offered several times a week, the MDC Plaintiffs and class members were constructively denied exercise during the fall and winter months. For example, MDC records show that on November 8, 2001, only 13 of the 46 9/11 detainees who were offered recreation accepted recreation. Two days later, on November 10, 2001, 11 9/11 detainees initially requested recreation, but all but two of them changed their minds when the time came, based on the cold wind that was blowing through the unit. MDC records indicate that the entire range was so cold that day, the officers wore jackets inside. Recreation was offered again on November 13, but again, only two detainees accepted due to the cold.

12[illegible]. Bajracharya, for example, almost always refused recreation. MDC records show that one of the few times he chose to visit the recreation cages was December 28, 2001 at 8:45 in morning. He was left out in the elements with only a thin coat until 11a.m., despite the fact that it was below freezing that day.

125. Khalifa was one of the few 9/11 detainees who frequently accepted recreation, despite the cold, because getting to breathe fresh air was the closest he could get to feeling free. His acceptance of recreation did not please the MDC guards, so they chose a cold day, and left him outside in the recreation cage in the freezing cold for four hours, with only a thin jacket. He knocked repeatedly at the door and asked the guards to get him, but they merely laughed at him. When he was finally brought back to his cell, he was shaking and could not feel his feet.

126. MDC staff documented Plaintiffs' and class members' consistent rejection of the opportunity for "recreation" in ADMAX SHU Reports created for review by MDC management, including Lopresti and Sherman. Despite receiving many complaints about the cold, Hasty decided not to issue warmer clothing to the 9/11 detainees, and decided that recreation would continue to be offered only in the chilly early morning.

127. Throughout the fall and winter, even the cells of the MDC Plaintiffs and class members were extremely cold. The MDC Plaintiffs were denied sweaters, jackets, other warm clothing, or bedding adequate to keep them warm. Throughout this period, MDC staff on the ADMAX unit frequently wore jackets while inside to keep warm.

**Lack of Hygiene Items and Provision of Inadequate and Unhealthy Food**

128. The MDC Plaintiffs and class members were deliberately denied adequate, healthy, and religiously appropriate food. Meals in the ADMAX SHU were meager and barely edible, leaving the MDC Plaintiffs hungry.

129. Contrary to the usual policy for inmates in administrative segregation, MDC Plaintiffs and class members were denied all access to the commissary, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty. Nor were they allowed to retain anything, even an extra apple, in their cells.

130. MDC Plaintiffs and class members were also denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, eating utensils, personal reading glasses, and a cup for drinking water, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty. Under the policy, hygiene items were passed out and then retrieved daily. Thus for the first several months of their detention, the MDC Plaintiffs and class members were not allowed to keep toilet paper, a towel, soap, a toothbrush, a cup, or other personal hygiene items in their cells, making it difficult to maintain proper health and hygiene, contrary to religious dictates and personal dignity. This policy was created for the 9/11 detainees, and had never been imposed on inmates in administrative or disciplinary segregation at MDC before.

**Deliberate Interference with Religious Rights**

131. MDC and Passaic Plaintiffs and class members were consistently burdened in their attempts to practice and observe their Muslim faith.

132. Soon after their arrival at MDC, Plaintiffs requested copies of the Koran, but did not receive them until weeks or even months later, pursuant to a written MDC policy (created by Cuciti and Lopresti, and approved by Hasty and Sherman) that prohibited the 9/11 detainees from keeping anything, including a Koran,

in their cell. Abbasi recalls that it was weeks before he received a Koran, and Hammouda and Mehmood did not receive one until a month after they were each detained. Benatta requested a Koran during the first several weeks of his detention, and never received one.

133. While detained in the ADMAX SHU, MDC Plaintiffs and class members were all denied the Halal food required by their Muslim faith, despite many requests for a Halal diet. MDC Plaintiffs and class members often chose not to eat the main part of their meals because they could not identify the type of meat it contained. This exacerbated the hunger caused by their already meager meals, and as a result, they were hungry almost every day of their confinement at MDC. Mehmood brought his religion to the attention of MDC staff as early as November 30, 2001, yet he was not cleared for a Halal diet until February 26, 2002. Abbasi never received Halal food in the ADMAX.

134. There was no clock visible to the 9/11 detainees, and MDC staff refused to provide them the time of day so that they could pray at the proper times. The staff also refused to tell 9/11 detainees the date, making it difficult for them to know when Ramadan began.

135. MDC Plaintiffs and class members were sometimes disciplined for not responding to a prison count because they were in the midst of their prayers. Hammouda, for example, received an incident report for refusing to stand up for count. He filed a grievance over this report, explaining that he needed to finish his prayer, and stood up as soon as he was done. As a result of the incident, he was prohibited from social visits for sixty days.

136. MDC staff frequently interrupted MDC Plaintiffs' and class members' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping, and telling them to "shut the fuck up" while they were trying to pray. Staff also mocked the detainees' prayer by attempting to repeat the Arabic phrases of the Azan (the call to prayer) loudly. One MDC guard frequently yelled "Jesus" whenever he heard the opening phrases of the Azan.

137. Evidence and complaints about these practices were brought to the attention of MDC management, including Hasty.

138. At Passaic, the policy to deny detainees the ability to practice their religion was implemented similarly. There too, guards disrupted prayer time by yelling and making noise. For example, guards would purposely wait until the detainees were praying to hand out razors and other hygiene supplies.

139. Detainees at Passaic were denied Halal food as well. For example, when Turkmen requested Halal food, the guard replied "This is not a hotel, this is a prison." The request was otherwise ignored.

**Failure to Provide Handbooks**

140. The usual channels for filing complaints of mistreatment were cut off at MDC. MDC handbooks which explained how to file complaints about mistreatment were not given to the MDC Plaintiffs and class members on a timely basis, if at all. Abbasi, for example, did not receive the MDC handbook until May of 2002. Some MDC Plaintiffs and class members, including Abbasi, received a short two-page explanation of policies at the ADMAX SHU, but that document did not include any information about making complaints, and was con-

fiscated by MDC staff shortly after it was provided. By putting them in the extremely isolated ADMAX SHU, imposing a communications blackout, and shutting down their ability to file complaints, MDC Defendants blocked MDC Plaintiffs' and class members' access to normal channels for lodging complaints of abuse and mistreatment.

## ALLEGATIONS CONCERNING INDIVIDUAL PLAINTIFFS

### Ahmer Iqbal Abbasi

141. Abbasi entered the United States in 1993 with a visitor visa, and subsequently sought political asylum from his native country of Pakistan. He remained in the United States unlawfully after that application was denied, only traveling one time in 1998 for a short trip to Pakistan. He drove a cab in Manhattan and saved up to purchase a small grocery store, which he sold prior to 2001.

142. Abbasi was arrested by the FBI on September 25, 2001. At the police station, he was interviewed at length by FBI, INS and NYPD officers. The officers asked Abbasi about his religious beliefs and practices.

143. Abbasi was not told why he was being arrested. He later learned that he came to the attention of the FBI because a house guest had presented a false social security card at the New Jersey Department of Motor Vehicles. The FBI became interested in Abbasi based only on the report that the card, and a passport, had been left by "a male possibly Arab" using Abbasi's address. Based on this information, and nothing more, Abbasi was held as "of interest" to the PENTTBOM investigation, and detained in maximum security confinement until cleared of any connection to terrorism.

144. On September 26, Abbasi was taken to the INS Varick Street detention center. He acknowledged that he had entered into a fraudulent marriage for the purpose of obtaining a green card, and stated that he would like to be deported. Abbasi was previously ordered removed and thus did not receive any immigration hearings. Abbasi could have been removed by the INS within weeks; instead, he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

145. On the afternoon of September 27, 2001 Abbasi was transported to MDC by the INS "Special Response Team" in a convoy of INS and NYPD vehicles. The Special Response Team members wore full body armor with helmets and goggles. The convoy used sirens, and the streets were shut down. Once at MDC, Abbasi was placed in the ADMAX SHU.

146. The conditions of Abbasi's confinement were harsh. Like the other MDC Plaintiffs and class members, Abbasi was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to the outside world, counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Abbasi was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Abbasi was not provided with timely notice of MDC's complaint procedures.

147. Whenever Abbasi was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his

destination, frequently inflicting unnecessary pain along the way, for example, by tightening his handcuffs and shackles so much that he periodically lost feeling in his fingers and thumb. He was beaten upon arrival at MDC, and systematically shoved into the wall upon later transports. Despite the pain, Abbasi offered no resistance, fearing that resistance would only make matters worse. In early October, MDC staff began video-recording his transports, and the physical abuse lessened then to some degree. The guards were also verbally abusive, and referred to Abbasi and the other detainees as "fucking Muslims" and "terrorists."

148. These conditions were completely without penological justification, as no one at the FBI or the BOP had any reason to suspect that Abbasi was dangerous or connected to terrorism. The FBI never developed any evidence to tie Abbasi to any terrorist activity, or indicate that he might be dangerous. Indeed, the only reason Abbasi was ever suspected of a connection to terrorism was his identity as a Muslim from Pakistan.

149. On October 2, 2001, SIOC at FBI Headquarters sent an electronic communication to the New York field office requesting information about Abbasi and other detainees. SIOC instructed the New York office to state whether the FBI had an investigative interest in Abbasi, describe the basis for the initial interest, supply specific information justifying continued interest or non-interest, and provide supporting documentation. It does not appear that the New York field office provided any information in response to this request.

150. On October 15, 2001, Abbasi was interviewed at MDC by a team of INS, FBI, and NYPD officers. He was asked if he could provide information regarding September 11, and questioned about his immigration

status and his marriage. This was the last time Abbasi was questioned by the FBI. In January, he was interviewed again by the INS regarding his marriage. None of these interviews developed any information tying Abbasi to terrorism or indicating that he might be dangerous.

151. By November 1, 2001, Abbasi had been cleared by the New York field office of any connection to terrorism. On that day, SIOC requested CIA name traces on over one hundred detainees, including Abbasi, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. FBI Headquarters indicated that these detainees would probably be released within seven days. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Abbasi, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision.

152. Over three months later, on February 7, 2002, Stephen Jennings, Acting Chief of the International Terrorism Operations section of the FBI's Counterterrorism Division, told Michael Pearson, Executive Associate Commissioner of the INS, that, after consultation with FBI Headquarters, the FBI had no investigative interest in Abbasi in connection to the PENTTBOM investigation. Mr. Jennings said that Abbasi could thus be removed from the INS's custody list. Abbasi was moved from the ADMAX SHU to the general population at MDC on February 14, 2002.

153. On February 26, 2002, Abassi was charged with three criminal offenses, including fraudulent marriage, falsification of a social security card, and credit card

fraud. He pled guilty to these offenses in June of 2002, and was sentenced to time served. He was deported on August 20, 2002.

154. Abbasi continues to suffer the emotional and psychological effects of his detention in the United States.

**Anser Mehmood**

155. Anser Mehmood was born in Lahore, Pakistan on January 12, 1960. He moved from Pakistan to the United States with his wife, Uzma, and three children in 1989. Uzma is Abbasi's sister. Mehmood entered the United States on a business visa and stayed after that visa expired. The family lived in Bayonne, New Jersey, and Mehmood's fourth child was born there in 2000. In May of 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

156. Mehmood used the money he made selling his successful business in Pakistan to start a trucking business which he operated on contract with a freight moving company based in Ohio. He was successful and saved enough money to purchase a house in New Jersey and send money home to his family in Pakistan. His children attended public school and adjusted well to life in the United States.

157. On the morning of October 3, 2001, Mehmood was asleep with his wife and year-old son. A team of FBI and INS agents knocked on his door. The agents searched their home and questioned Mehmood and his wife about their immigration status and their relatives, and showed them pictures of individuals who they did not recognize. The agents also asked him whether he was involved with a jihad. Mehmood acknowledged that he

had overstayed his visa, and showed the agents the social security number he was using to work.

158. Mehmood's arrest was a still more remote result of the FBI investigation of the lead that led to Abbasi's arrest—that "a male possibly Arab" left a fake social security card and passport at the New Jersey DMV. While investigating Abbasi, the FBI found the name of his sister Uzma. They came to the house to speak to her, not Mehmood.

159. The FBI told Mehmood they had no interest in him, but that they had to arrest Uzma, as they were interested in learning information from her about another brother, still living in Pakistan. Mehmood convinced the FBI to arrest him instead of Uzma, who was still breastfeeding their infant. The agent told Mehmood that they had no choice but to arrest one of the parents, but that Mehmood faced a minor immigration violation only, and he would be out on bail within days.

160. Mehmood was handcuffed and placed in a car with several INS officers, who transported him to the INS Varick Street detention center, where he was placed in a cell with several other Pakistani and Arab men who had also overstayed their visas. Later that day, he was placed in handcuffs and shackles and put in a van with three other men, flanked on either side by FBI vehicles, which blocked off the side roads as they drove to the Metropolitan Detention Center.

161. Mehmood was charged with overstaying his visa. On October 25, 2001 he was denied bond and political asylum. On December 5, 2001 he was ordered removed. He appealed, but this appeal was subsequently withdrawn. Throughout this period, he was detained in

harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

162. Mehmood's time in the ADMAX SHU at MDC was harsh. His abuse began the moment he entered MDC on October 4, 2001. He was dragged from the van by several large corrections officers, who threw him into several walls on his way into the facility. His left hand was broken during this incident and remained swollen for some time afterward. He later learned that he sustained neurological damage in his hand and hearing loss. Mehmood was photographed, and then re-photographed after MDC guards cleaned the blood from his mouth. The guards threatened to kill him if he asked any questions. One asked if he knew why he was at MDC. He responded that he was there for overstaying his visa. The guard disagreed, and said he was there for the attack on the World Trade Center.

163. Mehmood was then transported in handcuffs and shackles to the ADMAX SHU, and placed in a cell with a man named Ashraf.

164. The family's neighbors learned that Mehmood had been arrested through media reports, and began harassing the family. Mehmood's children were isolated and taunted at school. Uzma could not support the family without his financial contribution, and eventually, in February of 2002, Uzma and the children were forced to return to Pakistan.

165. The conditions of Mehmood's confinement were harsh. Like most if not all of the other MDC Plaintiffs and class members, Mehmood was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched,

and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Mehmood was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Mehmood was not provided with timely notice of MDC's complaint procedures.

166. Whenever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall. They were also verbally abusive, and stated that Mehmood was responsible for 9/11, so they would do to him what he did on that day. He also witnessed correctional officers make ethnic and religious slurs to other 9/11 detainees.

167. These conditions were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Mehmood of connection to terrorism or posing a danger. The FBI never developed any evidence to tie Mehmood to any terrorist activity or indicate that he might be dangerous. Indeed, the only reason Mehmood was ever suspected of a connection to terrorism was his identity as a Muslim from Pakistan.

168. Mehmood was never interviewed by the INS or the FBI after his arrest. According to FBI documents, Mehmood was of interest because he refused to accept a "lucrative transportation assignment" on September 11, 2001. However, by November or December of 2001, the FBI agent investigating Mehmood had determined that his refusal was ordered by the trucking company he did

contract work for, due to the turmoil following September 11, and that Mehmood should be deported. On November 1, 2001, Mueller requested CIA name traces on dozens of detainees, including Mehmood, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Mueller indicated that the detainees would probably be released within seven days.

169. Despite these indications, a December 17, 2001 list of FBI interest detainees maintained at FBI headquarters stated that Mehmood was "of interest" to the FBI. Mehmood's clearance at FBI Headquarters was "pending" by January 16, and finalized by January 30, 2002.

170. On February 6, 2002 Mehmood was moved to the general population in MDC. He was told that he would be deported shortly. It appears from FBI documents that this action was not based on Mehmood's clearance, but rather on a motion by his attorney to have him moved out of segregation. On March 29, 2002 he was charged with working with an unauthorized social security number. He pled guilty and was sentenced to eight months in prison. On April 4, 2002 he was transferred to Passaic County Jail, in New Jersey. He was deported to Pakistan on May 10, 2002.

171. Mehmood continues to suffer the emotional and psychological effects of his detention in the United States. Mehmood lost his home and business due to his detention, and has had trouble finding work in Pakistan.

**Benamar Benatta**

172. Benamar Benatta, a citizen of Algeria, initially entered the United States on a nonimmigrant visitor visa on December 31, 2000. Benatta was then a member of

the Algerian Air Force, and came to the United States to receive aviation training at a Northrop Grumman training facility. Benatta completed that training program, but remained in the United States past the expiration of his visa with the goal of seeking political asylum and gaining employment in this country. On September 5, 2001 he crossed the Canadian border with false documentation and applied for refugee status.

173. Benatta was detained by Canadian authorities for investigation. The day after the September 11 attacks, Canadian authorities alerted authorities in the United States to Benatta's profile and presence in Canada and transported him, against his will, back to the United States, where he was taken into custody by the INS. Benatta was detained for several days at the Rainbow Bridge port of entry in Niagara Falls, New York, where he was interrogated by the FBI regarding his false identification. A detailed summary of this interview was sent by electronic communication to SIOC, along with copies of investigatory notes by Canadian and US immigration officials and photocopies of the documents taken off Benatta.

174. The INS immediately commenced removal proceedings against Benatta based on his visa overstay and transferred him to Batavia Federal Detention Facility (BFDF). At BFDF, Benatta was served with a Notice to Appear at the Immigration Court in Batavia, New York on September 25, 2001. However, on September 16, 2001, before Benatta could retain or confer with counsel, he was transported to MDC in Brooklyn.

175. Benatta was transferred to MDC on a private jet, without explanation. He was one of the first detainees in the brand new ADMAX SHU, and thus there were no others to explain to him what was

happening. He was placed in the ADMAX SHU with nothing—no toilet paper, toothpaste, a toothbrush, or shoes. To protest his conditions he went on a seven day hunger strike. He began eating again after MDC staff told him he would be force fed, and described how they would stick a tube down his throat.

176. The conditions of Benatta's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Benatta was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Benatta was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Benatta was not provided with timely notice of MDC's complaint procedures.

177. Whenever Benatta was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately kicking Benatta's manacles and shackles into his lower body. Despite the pain, Benatta offered no resistance, fearing that resistance would only make matters worse.

178. Benatta's only consistent access to the outside world was the view from one small window. Even that was taken away when MDC officials painted over the window, to further punish Benatta and the other detainees. On April 6, 2002, Benatta received an incident report for attempting to scrape the frosting of his cell

window so he could see the outside world. After that incident report, MDC guards ordered Benatta to apologize to them, and retaliated against him by taken [*sic*] his blanket at night. The guards did this several times, and also once punished Benatta by taking his dinner.

179. Benatta's detention in harsh conditions had a profoundly deleterious impact on his health. Twice, Benatta attempted to injure himself due to his distress over the inexplicable, prolonged, and arbitrary confinement.

180. On October 6, 2001, Benatta's cellmate was removed for a medical emergency. Benatta was transferred to a recreation cage and was observed there banging his head into the concrete wall. MDC staff did nothing to stop him, nor did they seek psychological treatment for Benatta after this incident.

181. The lights were left on in his cell for 24 hours a day and guards banged on the walls and made loud noises in the night to keep him from sleeping. When Benatta tried to cover his face with a blanket to sleep, the guards ordered him to remove it. Benatta was unable to sleep for days at a time due to this abuse. On November 27, 2001 Benatta was left out in a recreation cage for two hours. The temperature that morning was in the 40s, and it was cloudy. When he was brought back inside, he requested a visit from the staff psychologist for sleep deprivation. After speaking to Benatta for five minutes through the door of his cell, the psychologist stated that Benatta was fine, and left.

182. The next day, November 28, 2001, Benatta asked to speak to the psychologist again. One hour later, one of the guards observed Benatta looking out his cell door

window and refusing to respond to the guard's statements. Twenty minutes after that Benatta's cellmate, Khalifa, sounded his distress alarm to alert the guards that Benatta was attempting to hurt himself by banging his head against the bars of his cell. Benatta does not remember what he was thinking, or whether he was trying to kill himself. He just snapped. The next thing he knew, several MDC guards entered his cell, jumped him, threw him to the floor and began beating and kicking him. Benatta believes that it was during this incident that he chipped his tooth. He was forcibly extracted from his cell by MDC guards and carried to a solitary strip cell, where he was tied tightly to a metal bed, without a mattress, and left for over four hours on suicide watch. He was subsequently released from four-point restraints and placed in ambulatory restraints for another two hours. At no point on that day nor afterwards was he removed from the unit for psychological treatment or a physical examination. From that day forward, Benatta was kept in a cell alone.

183. Benatta had several immigration hearings at MDC. On December 12, 2001, an INS attorney gave the immigration judge a document from the FBI's Counterterrorism Unit in Washington, which stated that Benatta was "of interest" to the FBI. The judge ordered him removed to Canada or, in the alternative, to Algeria. Although Benatta would have accepted removal to Canada, he appealed his removal order because the FBI officers who interrogated him threatened to have him put on a military jet and sent to Algeria, where Benatta feared execution. Benatta did not have the assistance of counsel in writing his appeal, or access to any assistance or law books. He did not even have use of a pen for

longer than ten minutes. That appeal was dismissed on April 8, 2002.

184. Benatta's conditions of confinement were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Benatta of connection to terrorism or posing a danger. The FBI never developed any evidence to tie Benatta to any terrorist activity or indicate that he might be dangerous. Indeed, the only reason Benatta was ever suspected of a connection to terrorism was his identity as a Muslim from Algeria.

185. Benatta was interrogated by the FBI several times during his detention at MDC. He was questioned about his religious practices and beliefs, his citizenship, and his Algerian Air Force employment. On September 29, 2001, information about Benatta, gleaned from an FBI interview at MDC on September 23, 2001, along with other interviews and investigation, was sent to SIOC from the New York FBI field office.

186. On October 1 and 2, 2001 SIOC sent electronic communications to the New York field office requesting information about Benatta and other detainees. As with Abbasi, SIOC instructed the New York field office to state whether the FBI had an investigative interest in Benatta, describe the basis for the initial interest, supply specific information justifying continued interest or non-interest, and provide supporting documentation.

187. The New York field office did not respond with any affirmative statement of interest or any information regarding Benatta's potential ties to terrorism. Despite this, at some point in late 2001 Benatta was identified as "of special interest" by the Joint Terrorism Task Force, and one summary of the FBI's investigation into Benatta

includes information from an MDC intelligence memo indicating that Benatta is suspected of ties to terrorist organizations. There is no indication of what this alleged suspicion was based upon, nor any supporting details. As early as November 2, 2001, the FBI agent assigned to Benatta's case determined that he was of no interest to the PENTTBOM investigation.

188. On November 5, 2001 the New York Field office indicated their investigation was complete by submitting Benatta's name to SIOC for FBI Headquarters to request a CIA name trace and officially clear him. Benatta was officially cleared of any connection to terrorism at FBI Headquarters on November 14, 2001. Both the FBI's New York field office and SIOC were aware that Benatta was not of interest to the PENTTBOM investigation, and information about Benatta's clearance was also available to officials in the Bureau of Prisons, and at the MDC. Despite this, until April 30, 2002 when he was transferred to general population, he remained in extremely restrictive conditions in the ADMAX SHU.

189. On May 3, 2002 SIOC sent another electronic communication to the New York field office again requesting information about whether the FBI had an interest in Benatta. The New York Field office responded on May 15, 2002 that they had no investigative interest in Benatta.

190. On December 12, 2001 Benatta was indicted in the Western District of New York for possession of a false social security card and a false alien registration receipt card. Despite a magistrate judge's order to "arrest Mr. Benatta, and bring him forthwith to the nearest Magistrate Judge" to answer the indictment,

Benatta was not arraigned, nor brought before any magistrate, until April 30, 2002.

191. On September 12, 2003 United States Magistrate Judge Schroeder recommended dismissal of both of the counts against Benatta, holding that Benatta's detention in MDC was criminal in nature, and violated his Sixth Amendment right to a speedy trial. See *United States* v. *Benatta*, No. 01-CR-247E, 2003 U.S. Dist. LEXIS 16514 (W.D.N.Y. Sept. 12, 2003). Judge Schroeder determined Benatta was in criminal detention because of his transfer from INS custody, against INS procedures, and without immigration justification, as well as his assignment of a United States Marshall Service number, his extremely restrictive conditions of confinement, and his repeated interrogations by the FBI. Judge Schroeder described Benatta's detention as a "subterfuge" and "sham," created to hide the reality that, because Benatta was an "Algerian citizen and a member of the Algerian Air Force, [he] was spirited off to the MDC Brooklyn ... and held in the SH[U] as 'high security' for the purposes of providing an expeditious means of having [him] interrogated by special agents of the FBI ...." *Id.* at 25. The judge held that Benatta was "primarily under the control and custody of the FBI" from September 16, 2001 until April 2002, and that accepting the United States' claim that Benatta "was being detained by the INS during that period of time, for the purpose of conducting removal proceedings would be to join in the charade that has been perpetrated." *Id.* at 30.

192. Benatta remained in the United States in immigration detention while he continued to seek political asylum. He was transferred to Canadian custody in 2006 and sought refuge [*sic*] status there. He was

granted refugee status from Canada in 2007, and his application for permanent resident status is currently pending.

193. Benatta continues to suffer the emotional and psychological effects of his seven and a half month detention in the ADMAX SHU. He has been diagnosed with post-traumatic stress disorder and has seen a therapist and tried different medications periodically since his release. He has trouble concentrating and writing, and is pessimistic about his chances in school or in a career. He is isolated from family and friends and has trouble communicating and trusting others. He has been unable to get a job, in part because no one will hire him after learning about his time in detention.

**Ahmed Khalifa**

194. Ahmed Khalifa entered the United States on July 16, 2001 on a student visa. Khalifa had completed five years of a six year program toward a medical degree at the University of Alexandria in Egypt. He planned to return to Egypt to complete the degree, and had a return ticket to Egypt for October 15, 2001. While in the United States, he worked for approximately six weeks at a clothing store. After that, he started working at a deli. He worked at both places without authorization.

195. Khalifa came to the attention of the FBI after the husband of a postal service worker reported a tip to the FBI hotline stating that several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money.

196. On September 30, 2001, Khalifa was home at the apartment he shared in Brooklyn with several Egyptian friends when there was a knock on the door. He opened the door to find over ten FBI, INS and NYPD officers.

One FBI agent asked Khalifa for identification, and Khalifa showed him his international travelers/student ID. The officers searched his wallet, and appeared to be very interested in a list of phone numbers of friends in Egypt.

197. The officers searched the apartment without consent. One FBI agent asked Khalifa about his roommates by name. They asked for his passport, and asked if he had anything to do with September 11. One of the FBI agents told Khalifa that they were only interested in three of the roommates, but another agent interrupted, and said they also needed Khalifa. An FBI agent asked an INS agent to arrest Khalifa for working without authorization. He was then handcuffed, and placed in a vehicle. They drove to the work places of Khalifa's other two roommates, who were not at home during the sweep, and arrested them as well.

198. Khalifa and the others were taken to the INS Varick Street detention facility, where they filled out some paperwork and were told they would be released after 24 hours. They were told not to contact their embassy otherwise it would mean trouble for them.

199. Khalifa was charged with working without authorization. On November 13, 2001, he was ordered removed from the United States. On that day, he waived his right to appeal the removal order because he thought accepting deportation would be the fastest way to get out of MDC. Khalifa could have been removed within days; instead he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

200. Khalifa was transported to MDC on October 1, 2001. The five roommates were all chained together by

officers in combat gear and escorted in armored convoy to MDC. When the convoy passed by Ground Zero, one officer stated, "See what you've done."

201. Khalifa was processed at the ground floor of MDC. One employee took his glasses. He did not receive another pair for 90 days. He was slammed into the wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor. Khalifa's wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell.

202. Khalifa was interviewed by the FBI and the INS on October 7, 2001 at MDC. One of the FBI officers noticed the bruises on Khalifa's wrists and apologized. When Mr. Khalifa told them he was being abused by MDC guards, they stated it was because he was Muslim. The agents questioned him about whether he knew Sheikh Omar Abdel-Rahman, and whether Khalifa was religious. They asked him how frequently he prayed and what mosques he visited in Egypt. This was his only interview with the FBI. In their notes of the interview, the FBI agents did not express any doubt as to Kahlifa's credibility, any suspicion of ties to terrorism, nor any interest in him in connection to the PENTBBOM investigation.

203. After the interview, Khalifa was strip-searched by MDC guards, who recorded the search with a video camera and laughed when they made him bend over and spread his buttocks.

204. The conditions of Khalifa's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Khalifa was placed in the ADMAX SHU arbitrarily and without justification, subjected to a

communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Khalifa was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Khalifa was not provided with timely notice of MDC's complaint procedures.

205. Whenever Khalifa was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately over-tightening his cuffs and twisting his fingers and wrists. They tried to conceal this abuse from the cameras. Despite the pain, Khalifa offered no resistance, fearing that resistance would only make matters worse. Guards on the night-shift smoked on the range and blew smoke into Khalifa's cell.

206. Toward the end of November, Khalifa was placed into a cell with Benamar Benatta. Benatta had a lot of trouble sleeping because of the cell lights and the guards making noises throughout the night. At one point, Benatta had not slept for four nights straight and tried to complain to the guards about it. Khalifa heard Benatta ask for them to turn off the lights, or for sleeping pills or even just something to read. No one responded. One night, Khalifa awoke in the middle of the night to find that Benatta had taken a plastic spoon and cut himself on his hand. The next morning, Benatta began slamming his head into the wall. Khalifa tried to stop

him, but Benatta pushed him away, so Khalifa pushed the distress button in his cell to call the guards.

207. The guards burst into the cell and removed Khalifa, who was crying over worry about Benatta. They lifted Benatta up and slammed him into the wall as they removed him from the cell. Khalifa did not see Benatta again.

208. Benatta's breakdown coincided with the fourth day of Khalifa's hunger strike. He was refusing to eat until the MDC guards allowed him to call the Egyptian consulate. After Benatta was removed from his cell, one MDC guard told Khalifa that Benatta was refusing to eat until Khalifa began to eat too. To help Benatta, Khalifa started eating again, despite his continued lack of consular access.

209. Khalifa made many requests of the guards: for shoes, books, and medical care, and for clothing to cover himself because female guards were present, and therefore saw him naked, during clothing exchange. None of these requests was granted.

210. Khalifa's conditions of confinement were completely without penological justification, as the FBI never developed any evidence to connect Khalifa to terrorism, and no one at the FBI or the BOP had any reason to suspect Khalifa of posing a danger. The only reason Khalifa was ever suspected of a connection to terrorism was his identity as a Muslim from Egypt.

211. By November 5, 2001, the New York office of the FBI had completed its clearance investigation of Khalifa, and sent his name to SIOC, at FBI headquarters, to be sent out for a CIA name trace. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them

that Khalifa, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. Khalifa's clearance was "pending" at FBI headquarters as early as November 14, 2001, yet Khalifa was held in limbo for months longer. A list of "of interest" detainees maintained at FBI headquarters dated December 17, 2001 states that the FBI had no interest in Khalifa, and that a clearance letter by Maxwell had been signed, but not sent. Khalifa was not officially cleared until December 19, 2001. He was not deported nor released from the ADMAX SHU until mid-January.

212. Khalifa was deported on January 13, 2002. It was the middle of the winter, but the MDC guards brought him to JFK airport wearing only pants and a t-shirt. Khalifa asked for a coat, and they refused.

213. Khalifa was seriously affected by his detention and abuse. He sought treatment for depression upon return to Egypt, and continues to suffer to this day. Among other symptoms, he has trouble concentrating, and has found his medical study difficult. These issues have negatively affected his career in medicine and his ability to enjoy life.

**Saeed Hammouda**

214. Saeed Hammouda lawfully entered the United States on August 31, 1999 on a business visa. He subsequently changed his status to a student visa and began studying to receive an MBA in marketing. He married a United States citizen with whom he had a prior relationship in March 7, 2001, and she petitioned for him to change his status to a lawful permanent resident.

215. On October 7, 2001, Hammouda was temporarily staying at the Manhattan apartment of a friend, Nabil Abdullah, when five or six FBI and INS agents arrived at his door. Hammouda allowed the agents to search the apartment. The FBI treated his friend's things as if they were Hammouda's and seized several items that belonged to Hammouda's friend including a computer, flight manuals, and an ice making machine.

216. The agents told Hammouda they were interested in him because he was not in the United States lawfully. The agents asked him if he was religious, what mosques he attended, and whether he prayed every Friday. Hammouda gave them his social security card and identification card. He was sick and preparing to take medicine, which they would not allow him to do. The INS agents asked him questions about his wife and his marriage. This lasted for several hours.

217. A week later, on October 14, 2001, FBI and INS agents returned to the apartment. One INS officer told Hammouda he was present in the country illegally and arrested him. Hammouda was transported to the INS Varick Street detention center and charged with violating his visa by working without authorization. When he was eventually brought before an immigration judge ("IJ"), an INS officer opposed his bond and the IJ denied bond. He was also brought for immigration hearings on November 14, 2001 and December 5, 2001. On February 15, 2002 he received a final removal order, which he did not appeal. The INS could have removed Hammouda within weeks, instead his deportation was delayed while he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

218. After processing at the Varick Street detention center, Hammouda was placed in a convoy of vehicles and transported to the MDC. He was processed on the ground floor of the MDC and his glasses were taken from him. During his transport and processing, Hammouda was verbally and physically abused and called derogatory names. He was pressed against the wall several times, and sometimes his face hit the wall. He was strip-searched three times, and called names such as "terrorist" and "Arabic asshole." He was then transported to the ADMAX SHU, where he was detained for eight months.

219. In January 2002, Hammouda was interrogated for four or five hours by two FBI agents and an INS officer. He was interrogated several times, and was administered a polygraph test. These interrogations and the polygraph test caused distress and anxiety.

220. The conditions of Hammouda's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Hammouda was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Hammouda was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Hammouda was not provided with timely notice of MDC's complaint procedures.

221. Whenever Hammouda was removed from his cell, he was placed in handcuffs, chains, and shackles.

Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately overtightening his cuffs and twisting his fingers and wrists. They tried to conceal this abuse from the cameras. Despite the pain, Hammouda offered no resistance, fearing that resistance would only make matters worse.

222. Officers routinely used profanity and called Hammouda derogatory names. One officer threw hygiene supplies at the detainees during the materials' distribution. Other officers made sexual comments about Hammouda's wife. Hammouda complained to various MDC supervisors about this abuse.

223. In the winter months the SHU was very cold at night. Mr. Hammouda could not sleep because of the lights and the temperature. On some nights, Mr. Hammouda paced his small cell to become fatigued and induce sleep.

224. Hammouda's conditions of confinement were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Hammouda of connection to terrorism or posing a danger. The FBI never developed any evidence to connect Hammouda to terrorism, or to cause concern that he might be dangerous. The only reason Hammouda was ever suspected of a connection to terrorism was his identity as a Muslim from Egypt.

225. As early as October, Hammouda's INS file indicated that he was not of interest. And on November 5, 2001 the New York Field office indicated their investigation was complete by submitting Hammouda's name to SIOC so that FBI Headquarters could request a CIA name trace and officially clear him. Headquarters

had apparently already received this clearance through another source, because on November 1, 2001, SIOC requested CIA name traces on over one hundred detainees, including Hammouda, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Headquarters indicated that the detainees would probably be released within seven days.

226. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Hammouda, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. However, as of December 17, 2001, FBI Headquarters listed Hammouda as "of interest." Hammouda was officially cleared by FBI Headquarters on January 17, 2002, yet he was not removed from the ADMAX. Inexplicably, on May 3, 2002 SIOC sent an electronic communication to the New York field office again requesting information about whether the FBI had an interest in Hammouda. The New York field office responded on May 15, 2002 that now they did have an investigative interest in Hammouda.

227. Despite having been cleared of any connection to terrorism in January, Hammouda was detained in the ADMAX until he was deported on June 14, 2002.

228. Hammouda continues to suffer the emotional and psychological effects of his detention in the United States. He felt like a stranger to his own family when he was released from custody. For almost eight months after his release, he did not work and remained at home. Even today, he has problems in open areas and prefers to be in little or no light. He is fearful of any travel outside Egypt.

**Purna Raj Bajracharya**

229. Bajracharya entered the United States in 1996 on a three-month B1 business visa. He overstayed that visa to remain in Queens, New York for five years. He worked at various odd jobs, including at a Queens Pizzeria and a flower Shop in Manhattan, and sent money home to his wife and sons in his native Nepal.

230. Bajracharya planned to return to his home, Katmandu, in fall or winter 2001. In anticipation of that return, he used his video-camera to record the New York streets he had grown to know, so that he could show them to his wife and children. Bajracharya came to the attention of the FBI on October 25, 2001, when a Queens County District Attorney's Office employee observed an "arab male" videotaping outside a Queens' office building that contained the Queens County District Attorney Office and a New York FBI office. Investigators from the Queens D.A. office approached Bajracharya, and asked him why he was taking pictures. Bajracharya, who speaks little English, tried to explain that he was a tourist. He was taken inside the building, searched, and interrogated. At some during the five hour long interview, FBI and INS agents arrived and took part.

231. Upon the agents' request, Bajracharya brought the FBI and INS to his apartment in Woodside and provided them with his passport and various identification documents. He acknowledged that he had overstayed his visa and was in the United States unlawfully.

232. Bajracharya was then placed under arrest by the INS. FBI Agent Wynne, who was assigned to investigate Bajracharya further, indicated to the INS that he would follow up with a telephone call the next day

regarding whether or not the FBI had interest in Bajracharya.

233. An INS form I-213 dated October 26, 2001 indicates that FBI interest in Bajracharya was "undetermined" and the case was assigned to FBI Agent Wynne. That day, however, the FBI special agent in charge of the New York Joint Terrorism Task Force told the INS that Bajracharya was "of active investigative interest to the FBI" based on the videotaping. Thus, the INS district director recommended that Bajracharya be detained in MDC. A second I-213 was issued, indicating that the FBI had "special interest" in Bajracharya. The following day, October 27, the Custody Review Unit at INS headquarters in DC approved Bajracharya's transfer to MDC.

234. Bajracharya was transported to MDC on October 27, 2001. He recalls being pushed forcibly when he was brought out of the van and seeing a T-shirt on the wall with a picture of an American flag on it. He was taken to the ADMAX SHU and placed in a cell alone. He remained alone for the next two months.

235. Bajracharya was interviewed at MDC, this time with the assistance of an interpreter, by FBI Agent Wynne and other law enforcement personnel on October 30, 2001. Bajracharya provided the agents with information about his time in the United States, his employment history and his finances, and explained that he was videotaping the building in question as a tourist. Bajracharya was asked whether he was Muslim or knew any Muslims. A Buddhist, Bajracharya explained that he was not Muslim, knew no Muslims, and loved the United States but was planning to return to Nepal to be with his family. In his notes regarding the interview, Wynne did not express any doubt as to Bajracharya's credibility, any

suspicion of ties to terrorism, nor any interest in him in connection to the PENTTBOM investigation.

236. Two days later, after corroborating various aspects of Bajracharya's statements, FBI Agent Wynne issued an FBI report clearing Bajracharya of any connection to terrorism and informed him that he could expect the matter to be resolved within a week or so. That weekend, Wynne received pleading phone calls from Bajracharya's sons, who had learned of their father's arrest from his roommate in Queens.

237. By November 5, 2001, the New York office of the FBI had completed its clearance investigation of Bajracharya and sent his name to SIOC, at FBI headquarters, to be sent out for a CIA name trace. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Bajracharya, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. Other FBI documents, including a list of interest detainees maintained in FBI headquarters, indicate that the FBI had closed its investigation and concluded they had no interest in Bajracharya by mid-November 2001. Despite all these clearances, Bajracharya was held at MDC in the ADMAX SHU until he was deported on January 13, 2001.

238. Throughout Bajrachareya's confinement, Agent Wynne spoke to counterterrorism officials in the United States Attorney's Office and within the INS, seeking to understand why the detainee he had affirmatively cleared of any connection to terrorism was still in the ADMAX SHU at MDC. After becoming frustrated with his inability to achieve official clearance for Bajracharya,

Wynne called The Legal Aid Society, and advised an attorney there, Olivia Cassin, that Bajracharya needed representation.

239. The conditions of Bajracharya's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Bajracharya was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Bajracharya was not provided with timely notice of MDC's complaint procedures.

240. Bajracharya is a small man—approximately 5'3", and, at the time of his arrest, about 130 pounds. Whenever Bajracharya was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination. Bajracharya offered no resistance, fearing that resistance would only make matters worse.

241. Bajracharya could not sleep due to the light in his cell. He was so traumatized by his experience at MDC that he began weeping constantly. He thought he was going crazy, and several times indicated to MDC personnel that he was feeling suicidal. He recalls screaming to guards that he was going to die. Indeed, Cassin asked an MDC doctor to transfer Bajracharya to general population, and the doctor responded that Bajracharya was crying too much, and would cause a riot. Guards on the ADMAX scolded Bajracharya for crying, and called him and the other detainees foul names.

242. Bajracharya's conditions of confinement were completely without penological justification, as the FBI never developed any evidence to connect Bajracharya to terrorism, and the FBI officer in charge of investigating Bajracharya affirmatively found that he posed no danger as early as November 1, 2001. No one at the FBI or the BOP had any reason to suspect Bajracharya of posing a danger. The only reason Bajracharya was ever suspected of a connection to terrorism was his "Arab" appearance.

243. Bajracharya was charged with a section 237(a)(1)(B) overstay. He attended an immigration hearing at MDC on November 1, 2001 and another on November 19, 2001, during which the immigration attorney assigned to his case sought and received a continuance, as FBI clearance to release Bajracharya had not yet been received from Washington, DC. Bajracharya did not have counsel present at that hearing. Ms. Cassin was first able to meet with Bajracharya at MDC for his next immigration hearing on December 6, at which the government acknowledged that Bajracharya had been cleared by the FBI and agreed to voluntary departure. Based on the immigration judge's instructions, Cassin bought Bajracharya an airplane ticket to Katmandu through a deportation officer, but that departure date was cancelled without explanation.

244. Bajracharya was deported to Nepal on January 13, 2002. Cassin and Wynne brought a suit to MDC and provided it to an assistant warden there so that Bajracharya would, at least, have clothing to fly home in. Instead, he was taken to a plane in an orange jumpsuit and shackles. Bajracharya's treatment at the ADMAX SHU profoundly affected him, and continues to affect him. Since his release, he has felt introverted, is quicker

to anger, and is less inclined to leave his home and visit with friends. He has trouble sleeping, and feels as though he has lost himself.

**Ibrahim Turkmen**

245. Ibrahim Turkmen entered the United States through New York City on a tourist visa in early October 2000 to visit an old friend from Turkey who lived on Long Island.

246. In late October 2000, Turkmen, at his friend's suggestion, found work at a service station in Bellport, Long Island. He worked there several days a week until mid-January 2001, when he took a job at another service station in the same town. In mid-April 2001, he began working part-time for a locally-based Turkish construction company.

247. From his arrival in the United States until he was taken into INS custody, Turkmen frequently called his wife and four daughters back in Turkey. While dearly missing them, he decided to remain in the United States to provide for their support. Each week, Turkmen sent most of his meager earnings home to his family.

248. Turkmen spoke almost no English when he came to the United States. While here, he learned barely enough English words to conduct his limited daily business. At the time that he was taken into custody, Turkmen understood very little spoken English, and he could not read English at all.

249. At about 2:30 p.m. on October 13, 2001, slightly more than a month after the September 11 terrorist attacks, two FBI agents visited Turkmen at the apartment where he was staying with several Turkish friends in West Babylon, New York. Without advising him of his right to counsel, they asked Turkmen whether

he had any involvement in the September 11 terrorist attacks and whether he had any association with terrorists. They also inquired as to his immigration status, among other things.

250. Turkmen had great difficulty understanding the FBI agents' questions given his limited knowledge of English and the lack of an interpreter. All the same, he did his best to answer truthfully. He denied any involvement with terrorists, terrorist organizations, or terrorist activity. The FBI agents, nonetheless, accused Turkmen of being an associate of Osama bin Laden, placed him under arrest, confiscated his personal items (passport, identification, credit cards, etc.) and money, and searched his home without his consent. Turkmen was fully interviewed on October 13, 2001 and no information was uncovered to connect him to the terrorism investigation.

251. Turkmen came to the attention of the FBI when his landlord called the FBI hotline to report that she rented an apartment in her home to several Middle Eastern men, and she "would feel awful if her tenants were involved in terrorism and she didn't call." The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time.

252. Turkmen was taken to an INS facility in Nassau County, fingerprinted, and further interrogated, this time by an INS official. Once again, he was not advised of his right to counsel. Due to his limited knowledge of English and the lack of an interpreter, Turkmen again had great difficulty understanding the questions. Still, he did his best to answer them truthfully. Turkmen again denied any involvement with terrorists, terrorist organizations, or terrorist activity, and requested a

hearing before an immigration judge to determine whether he could remain in the United States. He was held at the Nassau County INS facility for five or six hours.

253. That evening, at approximately 11:30 p.m., Turkmen was brought to another INS facility in Manhattan, where INS officials asked him still more questions in English. Despite great difficulty understanding the questions, and without the aid of an interpreter, Turkmen again did his best to answer them truthfully. For the third time, he denied any involvement with terrorists, terrorist organizations, or terrorist activity.

254. Turkmen's interrogators then instructed him to sign various immigration papers which he could not read because they were in English. Afraid that he would only make matters worse for himself if he refused to comply, Turkmen reluctantly signed the papers.

255. Early the next morning, October 14, 2001, Turkmen was taken to the Passaic County Jail in Paterson, New Jersey, where he remained confined, except for a single trip to Immigration Court in Newark, New Jersey, until February 25, 2002, a period of nearly four and one-half months.

256. Shortly after arriving at the Passaic County Jail, Turkmen received a Notice to Appear from the INS, charging him with overstaying his visa and scheduling a hearing at Immigration Court in Newark, New Jersey on October 31, 2001. On the same date, he received a Notice of Custody Determination and requested a re-determination of the custody decision by an immigration judge.

257. On October 29, 2001, two FBI agents visited Turkmen at the Passaic County Jail. They asked him still more questions about his immigration status, his reasons for entering the United States, his work experience, his religious beliefs, and other personal matters. Another Turkish 9/11 detainee fluent in English translated the questions for Turkmen, who answered them all truthfully. For the fourth time, he denied any involvement with terrorists, terrorist organizations, or terrorist activities.

258. Two days later, on October 31, 2001, Turkmen was taken to Immigration Court in Newark, New Jersey, where he appeared pro se before an Immigration Judge. Once again, he was not advised of his right to counsel. While an interpreter was present, the interpreter was not of Turkish descent and was fluent in neither Turkish nor English. After conceding that he had overstayed his tourist visa, Turkmen accepted a voluntary departure order requiring him to leave the United States by November 30, 2001. He declined to request bond because the judge assured him that he would be allowed to return to Turkey within a matter of days. The INS never appealed the voluntary departure order issued to Turkmen.

259. When he returned to the Passaic County Jail later that day, Turkmen called a friend to ask him to purchase a plane ticket for Turkmen's return to Turkey. Two days later, on November 2, 2001, Turkmen's friend brought the ticket to the INS offices in Newark, New Jersey. Turkmen remained, nonetheless, in the Passaic County Jail for nearly four more months, until February 25, 2002. The INS prevented his compliance with the Immigration Judge's voluntary departure order and

thereby caused an automatic entry of an order of removal with a future bar on reentry for 10 years.

260. While confined in the Passaic County Jail, Turkmen was not allowed to call his wife and four daughters back home in Turkey. He learned through a friend, however, that his wife had been hospitalized for a month with an undisclosed ailment so serious that she lost most of her hair and teeth. Upon learning this, Turkmen was beside himself with worry. Unable even to call his seriously ailing wife, he suffered extreme emotional distress.

261. While confined in the Passaic County Jail, Turkmen was deliberately denied the ability to observe the mandatory practices of his religion, for example, by regularly interrupting his daily prayers and refusing to serve him Halal food.

262. On November 1, 2001, Mueller sent an electronic communication requesting CIA name traces on dozens of detainees, including Turkmen, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Mueller indicated that the detainees would probably be released within seven days. Turkmen was detained for months longer. A November 16, 2001 memo from the regional director of the INS indicated that the FBI's interest in Turkmen was "unknown."

263. On January 14, 2002, more than three months after he was taken into custody and more than two and one-half months after he received a voluntary departure order, the Assistant Special Agent in Charge of the New York FBI indicated to the INS that Turkmen had been cleared on any connection to terrorism. A few days later, on January 17, 2002, Turkmen was visited by an INS

agent. The agent informed Turkmen that he had been "cleared" by the FBI but still needed to be "cleared" by the INS. When Turkmen asked how long the latter "clearance" might take, the agent replied that he did not know. On January 31, the INS acknowledged that Turkmen was not of interest to the FBI and thus removed him from the INS custody list, thereby clearing him to be deported.

264. On February 17, 2002, Turkmen was visited by another INS agent, who told Turkmen that he had received INS "clearance" and would be allowed to depart the United States within the next two weeks. Eight days later, on February 25, 2002, INS agents took Turkmen in handcuffs from the Passaic County Jail to Newark Airport, where they put him on a plane to Istanbul, Turkey, without a single penny or lira in his pocket. Although Turkmen requested the return of $52 confiscated from him at the time of his arrest—money that he needed to pay for, among other things, the eight-hour bus trip from Istanbul Airport to his home in the City of Konya—that request was denied.

265. As soon as Turkmen debarked from the plane at Istanbul Airport, he was met by a Turkish police officer, who escorted him to a nearby police station, where he was interrogated for about an hour concerning his four-and-one-half month detention in the United States. Once again, Turkmen denied any involvement with terrorists, terrorist organizations, or terrorist activity. After the interrogation concluded, he was allowed to leave for Konya, though he still had no money to buy the bus ticket. Only the kindness of a complete stranger who lent the necessary funds permitted Turkmen to return home.

266. Turkmen was again interrogated at length concerning his detention in the United States, this time

by Konya's Security Intelligence Division, following the filing of this lawsuit on April 17, 2002. At the close of the interrogation, the Division's Superintendent told him to "be careful." Approximately 10 days later, Turkmen's father was contacted by the Head of Gendarmerie in Konya's Karapinar District, Turkmen's birthplace, to ascertain Turkmen's current address, ostensibly to "give to the human rights organizations that are trying to reach Turkmen." Several days later, the Head of Gendarmerie in Konya's Cumra District asked Turkmen's former employer for Turkmen's personnel file. After reviewing the file, that gendarme took with him all the documents relating to Turkmen's 16 years of public service.

267. The presumption of guilt thus follows Turkmen even after his deportation from the United States, despite the fact that he has never been involved in terrorist activity and the complete absence of any evidence of his involvement in such activity. Because of this presumption, Turkmen is deemed a "security risk" and is thus unable to return to his prior government position.

268. Turkmen continues to suffer the emotional and psychological effects of his four and one-half months detention in the United States. He regularly experiences nightmares about his detention, making it difficult for him to sleep.

**Akhil Sachdeva**

269. Plaintiff Akhil Sachdeva is a native of India and a landed resident in Canada. In late September or early October 2001, Sachdeva returned to the United States from Canada to finalize his divorce from his wife and collect his personal belongings for his move back to

Canada. Sometime in late November 2001, an FBI agent visited the gas station owned by Sachdeva's ex-wife in Port Washington, New York, looking for a Muslim employee. Not finding that individual, the agent left a message for Sachdeva's ex-wife to contact the agent. She, in turn, asked Sachdeva to do so.

270. Sachdeva came to the attention of the FBI when a New York City fireman called the FBI hotline and reported that he had overheard two gas station employees "of Arab descent" having a conversation in Arabic and English, and the English included some discussion of flight simulators and flying.

271. In early December 2001, Sachdeva called the FBI agent, who asked Sachdeva to come to the agent's offices for an interview. Sachdeva agreed to do so. On December 9, 2001, Sachdeva met with two FBI agents at 26 Federal Plaza in Manhattan. They proceeded to question him at length about the September 11 terrorist attacks and his religious beliefs, among other things, though without advising him of his right to counsel or his right to remain silent. At the close of the interrogation, the agents examined Sachdeva's personal identification before allowing him to leave.

272. Sachdeva continued to close out his affairs in the United States in anticipation of his move back to Canada. In the early morning of December 20, 2001, while at his uncle's apartment, Sachdeva was arrested by INS agents. He was taken to the INS offices at 26 Federal Plaza, where he was interrogated for five hours about his ties to the September 11 terrorist attacks. At the close of the interrogation, INS agents confiscated all of Sachdeva's personal identification. He was then taken to Passaic County Jail. A memorandum from the interview of Sachdeva on December 20, 2001, the day of his arrest,

indicates that the FBI had no further interest in Sachdeva related to the PENTTBOM investigation. Because no one asserted an investigative interest in Sachdeva, the New York INS office indicated to INS headquarters that FBI interest in Sachdeva was "undetermined." The FBI did not officially clear Sachdeva until January 30, 2002, over a month later.

273. On December 27, 2001, while confined in Passaic County Jail, Sachdeva received a Notice to Appear, charging him with illegal re-entry. (He had overstayed a prior voluntary departure order.) Sachdeva had a hearing on December 31, 2001, in Immigration Court in Newark, New Jersey. He was not given any extra clothing for the trip, despite the extreme cold. The immigration judge told Sachdeva that he would be deported to Canada or India "within 30 days." The INS did not appeal that final deportation order. A February 14, 2002 INS document lists Sachdeva as "ready to remove." Even though the INS could have effectuated Sachdeva's removal from the United States within a matter of days, Sachdeva was detained for another three and one-half months, until April 17, 2002.

274. On April 17, 2002, INS agents took Sachdeva, in old clothes, from Passaic County Jail to Newark Airport, putting him on a plane to Canada, though without his personal identification or any money. Prior to his deportation, Sachdeva requested the return of these items. His requests were denied.

275. Sachdeva continues to suffer the effects of his detention in the United States long after his deportation. Upon his return to Canada, Canadian immigration officials suspended his landed immigrant status, taking away Sachdeva's work papers. The presumption of guilt thus continued to attach to Sachdeva after his depor-

tation from the United States, despite the fact that he has never been engaged in terrorist activity and the complete absence of any evidence that he has been engaged in such activity.

**FIRST CLAIM FOR RELIEF**

**Fifth Amendment: Due Process—Conditions of Confinement**

276. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

277. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

278. By adopting, promulgating, and implementing the policy and practice under which MDC Plaintiffs and class members were unreasonably detained and subjected to outrageous, excessive, cruel, inhumane, punitive and degrading conditions of confinement, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly deprived MDC Plaintiffs and class members of their liberty interests without due process of law in violation of the Fifth Amendment to the United States Constitution.

279. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered physical and psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

**SECOND CLAIM FOR RELIEF**

**Fifth Amendment: Equal Protection—Conditions of Confinement**

280. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

281. Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

282. In subjecting Plaintiffs and class members to harsh treatment not accorded similarly-situated non-citizens, Defendants, acting under color of law and their authority as federal officers, singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin, and intentionally violated their rights to equal protection of the law under the Fifth Amendment to the United States Constitution.

283. As a result of Defendants' unlawful conduct, Plaintiffs and class members have suffered physical and psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

**THIRD CLAIM FOR RELIEF**

**First Amendment: Free Exercise of Religion**

284. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

285. Plaintiffs Ibrahim Turkmen, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, and Saeed Hammouda bring this claim on their own behalf and on behalf of the class against all Defendants.

286. Defendants adopted, promulgated, and implemented policies and practices intended to deny Plaintiffs and class members the ability to practice and observe their religion. These policies and practices have included, among other things, the visitation of verbal and physical abuse upon Plaintiffs and class members, and the deliberate denial of all means by which they could maintain their religious practices, including access to Halal food and daily prayer requirements. By such mis-

treatment, Defendants, acting under color of law and their authority as federal officers, have intentionally or recklessly violated Plaintiffs' and class members' right to free exercise of religion guaranteed to them under the First Amendment to the United States Constitution.

287. As a result of Defendants' unlawful conduct, Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

**FOURTH CLAIM FOR RELIEF**

**First Amendment: Communications Blackout and Interference with Counsel**

288. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

289. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

290. By adopting, promulgating, and implementing the policy and practice under which MDC Plaintiffs and class members were subjected to a "communications blackout" and other measures while in detention that interfered with their access to family, lawyers and the courts, Defendants intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the First Amendment of the United States Constitution.

291. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

## FIFTH CLAIM FOR RELIEF

### Fifth Amendment: Due Process—Blackout and Interference with Counsel

292. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

293. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

294. By adopting, promulgating, and implementing the policy and practice under which Plaintiffs and class members were subjected to a "communications blackout" and other measures while in INS detention that interfered with their access to family, lawyers and the courts, Defendants intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

295. MDC Plaintiffs and class members have no effective means of enforcing their Fifth Amendment rights other than by seeking declaratory and other relief from the Court.

296. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

## SIXTH CLAIM FOR RELIEF

**Fourth and Fifth Amendments: Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip-Searches**

297. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

298. The MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all MDC Defendants.

299. By subjecting MDC Plaintiffs and class members to excessive and unreasonable strip-searches with no rational relation to a legitimate penological purpose when Defendants had no reasonable suspicion or rational reason to justify a strip-search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, MDC Defendants intentionally or recklessly violated MDC Plaintiffs' and class members' rights to privacy and to be free from unreasonable searches, in violation of their rights under the Fourth Amendment to the United States Constitution.

300. MDC Defendants were grossly negligent and/or deliberately indifferent in their supervision of MDC staff who subjected MDC Plaintiffs and class members to these excessive and punitive strip-searches and thereby violated MDC Plaintiffs' and the plaintiff class's rights under the Fourth Amendment to the United States Constitution.

301. By creating and approving the policy and practice under which MDC Plaintiffs and class members were subjected to these punitive strip-searches MDC Defendants intentionally or recklessly violated MDC

Plaintiffs' and class members' right to be free from punishment under the Due Process Clause of the Fifth Amendment to the United States Constitution.

302. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

**SEVENTH CLAIM FOR RELIEF**

**(42 U.S.C. § 1985: Conspiracy To Violate Civil Rights)**

303. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

304. Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

305. Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Sherman, Lopresti and Cuciti, by agreeing to implement a policy and practice whereby Plaintiffs were harassed, physically and verbally abused, subjected to harsh and punitive conditions of confinement, subjected to routine and unreasonable strip-searches, burdened in their exercise of their religious beliefs, denied adequate recreation, nutrition, access to counsel and communication with the outside world because of their race, religion, ethnicity and national origin, conspired to deprive Plaintiffs of the equal protection of the law and of equal privileges and immunities of the laws of the United States, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3).

306. As a result of Defendants' unlawful conduct Plaintiffs suffered physical injury and emotional distress and are accordingly entitled to compensatory damages against all Defendants.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and class members respectfully request that the Court enter a class-wide judgment:

1. Certifying this suit as a class action;

2. Awarding compensatory and punitive damages to Plaintiffs and class members for the constitutional violations they suffered in an amount that is fair, just, reasonable, and in conformity with the evidence;

3. Awarding Plaintiffs attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

4. Ordering such further relief as the Court considers just and proper.

Dated: New York, New York
September 13, 2010

Respectfully submitted,
/s/Rachel Meeropol
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# APPENDIX F
# U.S. DEPARTMENT OF JUSTICE
# OFFICE OF THE INSPECTOR GENERAL

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## THE SEPTEMBER 11 DETAINEES:
## A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS

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April 2003

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## CHAPTER ONE
## INTRODUCTION

### I. BACKGROUND

On September 11, 2001, terrorists hijacked four airplanes and flew two of them into the World Trade Center Towers in New York City and one into the Pentagon in Arlington, Virginia. The fourth plane crashed into a field in southwestern Pennsylvania before it could strike a target in Washington, D.C. The attacks killed more than 3,100 people, including all 246 people aboard the 4 airplanes.

The Federal Bureau of Investigation (FBI) immediately initiated a massive investigation, called "PENTTBOM," into this coordinated terrorist attack. The FBI investigation focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts. In addition, the FBI worked with other federal, state, and local law enforcement agencies to prevent follow-up attacks in this country and against U.S. interests abroad.

Shortly after the attacks, the Attorney General directed the FBI and other federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to,

terrorist activities."[1] One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide.[2] Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others, however, were arrested and detained for violating federal immigration law.

Our review determined that the Immigration and Naturalization Service (INS) detained 762 aliens as a result of the PENTTBOM investigation. Of these 762 aliens, 24 were in INS custody on immigration violations prior to the September 11 attacks. The remaining 738 aliens were arrested between September 11, 2001, and August 6, 2002, as a direct result of the FBI's PENTTBOM investigation. All 762 detainees were placed on what became known as an "INS Custody List"

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[1] Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (September 17, 2001).

[2] In the weeks and months following the attacks, various totals of the number of people arrested in connection with the September 11 investigation were released by the Department of Justice or appeared in media accounts. A senior official in the Department's Office of Public Affairs told the Office of the Inspector General that in the weeks after the terrorist attacks her office provided frequent updates to the media on the number of persons questioned, arrested, and detained by federal, state, and local law enforcement officials. According to this official, the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.

because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism.

The Government held these aliens in a variety of federal, local, and private detention facilities across the United States while the FBI investigated them for ties to the September 11 attacks or terrorism in general. These facilities included several Federal Bureau of Prisons (BOP) institutions such as the Metropolitan Detention Center in Brooklyn, New York; the Federal Detention Center in Oakdale, Louisiana; and the U.S. Penitentiary in Leavenworth, Kansas; INS facilities such as the Krome Service Processing Center in Miami, Florida; and state and local facilities under contract with the INS to house federal immigration detainees, such as the Passaic County Jail in Paterson, New Jersey, and the Hudson County Correctional Center in Kearny, New Jersey.

Soon after these detentions began, the media began to report allegations of mistreatment of the detainees. For example, detainees and their attorneys alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had no involvement in terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained.

Several individual detainees and non-profit organizations filed lawsuits against the Department of Justice (Department) protesting the lack of public information about the detainees and the length and conditions of the detainees' confinement. For example, the Center for National Security Studies brought suit against the Department under the Freedom of Information Act seeking in-

formation about the detainees, including their names and where they were being held.[3] Five detainees filed a class action lawsuit alleging they were physically abused, verbally abused, and held without a legitimate immigration or law enforcement purpose long after they received final removal or voluntary departure orders.[4] In addition, advocacy organizations such as Amnesty International and the Lawyers Committee for Human Rights issued reports asserting mistreatment of the detainees or mishandling of their cases.[5]

Pursuant to our responsibilities under the USA PATRIOT Act (Patriot Act) and the Inspector General Act, the Department of Justice Office of the Inspector General (OIG) initiated this review to examine the treatment of detainees arrested in connection with the Department's September 11 terrorism investigation.[6] Specifically, the OIG's review focused on:

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[3] *Center for National Security Studies* v. *United States Department of Justice*, 01-civ-2500 (D.D.C. filed December 6, 2002).

[4] *Turkmen* v. *Ashcroft*, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

[5] See, *e.g.*, "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Human Rights Watch (August 2002); "A Year of Loss: Reexamining Civil Liberties Since September 11," Lawyers Committee for Human Rights (September 5, 2002).

[6] Pub. L. No. 107-56 (2001). The USA PATRIOT Act was signed by the President on October 26, 2001, approximately six weeks after the September 11 terrorist attacks. The Patriot Act provides new or enhanced law enforcement authorities, including the sharing of foreign intelligence information, increased penalties for money laundering and other financial crimes, and stricter controls on immigration. In addition, Section 1001 of the Patriot Act directs the OIG to receive and review claims of civil rights or civil liberties violations by Department employees.

- Issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
- Bond determinations for detainees;
- The removal process and the timing of removal; and
- Conditions of confinement experienced by detainees, including their access to legal counsel.

We focused our review on INS detainees housed at two facilities—the BOP's Metropolitan Detention Center (MDC) in Brooklyn and the Passaic County Jail (Passaic) in Paterson, New Jersey. We chose these two facilities because they held the majority of September 11 detainees and were the focus of many complaints about detainee mistreatment.

Our review did not seek to examine all aspects of the Department's terrorism investigation, including the specific investigative techniques involved in the September 11 investigation or the decisions made by federal, state, and local law enforcement on why to detain specific individuals.[7] Additional issues beyond the scope of this re-

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[7] Some constitutional arguments have been raised regarding the Department's treatment of September 11 detainees. The claims were made in a variety of contexts, some of which are inapplicable in the immigration context and some of which are beyond the scope of this report. Removal proceedings are matters of civil rather than criminal law. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Because they are not criminal proceedings, some constitutional protections that apply in the context of a criminal prosecution do not apply in a removal proceeding. For example, immigration detainees have no Sixth Amendment right to counsel. While they are permitted to

view include the reasons and justifications for the Department's decision to limit public release of information concerning arrests related to the ongoing terrorism investigation, its decision to close immigration proceedings to the public, and its use of voluntary interviews for certain categories of aliens.[8] Several lawsuits related to these issues are ongoing. In addition, our review did not examine the Department's use of material witness warrants to detain certain individuals in connection with its terrorism investigation, another issue currently being litigated in the courts.[9]

Rather, our review focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation. We examined the reasons why many of the detainees experienced prolonged confinement. In addition, we examined the detainees' conditions of confinement, including their access to counsel, access to medical care, and allegations of physical or verbal abuse by correctional officers.

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be represented by an attorney, they must find and pay for the attorney themselves, unlike in criminal cases where the Government provides defendants with an attorney if they are unable to pay for counsel.

[8] For example, on November 9, 2001, the Department and the FBI sought voluntary interviews with approximately 5,000 male visitors or foreign nationals between the ages of 18 and 33 who had entered the United States after January 2000 from countries "where there have been strong al Qaeda presences." See Attorney General John Ashcroft, Press Conference (March 20, 2002).

[9] A material witness warrant can be obtained from a judge upon a showing that the testimony of a person is material to a criminal proceeding and that it may become impracticable to secure the presence of the person by subpoena. See 18 U.S.C. §3144. A person held on such a warrant is referred to as a "material witness." See *United States* v. *Awadallah*, 202 F. Supp. 2d. 55 (S.D.N.Y. 2002).

In this report, we discuss the actions of senior managers at the Department, the FBI, the INS, and the BOP, who established the broad policies and led the investigation in response to the September 11 attacks; the actions of the INS, which processed and detained many of the aliens arrested in the aftermath of September 11; and the actions of the BOP, which housed many of the detainees.

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges. It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation.

## II. Methodology Of This Review

The OIG conducted interviews, fieldwork, and analysis for this review from March 2002 until March 2003. As noted above, we focused on two detention facilities, the MDC in Brooklyn, New York, and the Passaic County Jail in Paterson, New Jersey. We chose the MDC because it housed 84 aliens arrested in the aftermath of the September 11 terrorist attacks. In addition, the MDC received widespread media coverage for allegations of abuse against detainees and for the restrictive conditions of confinement it imposed on the detainees. We selected Passaic because it housed 400 aliens arrested in connection with the September 11 terrorism investigation—the most in any single facility—and, like the MDC, was the subject of many media articles regarding the treatment of detainees.

In this review, "September 11 detainees" are defined as aliens held on immigration violations in connection with the investigation of the September 11 attacks. The FBI categorized these aliens as either "of interest," "of high interest," or "of undetermined interest" to its terrorism investigation. The INS treated all three categories as "September 11 detainees," and sometimes referred to them as "special interest" or "of interest" detainees.[10]

As noted above, the Department detained 762 aliens on immigration charges in connection with its terrorism investigation between September 2001 and August 2002. From the total of 475 September 11 detainees held at the MDC and Passaic,[11] we selected a sample of 119 detainees—53 held at the MDC and 66 confined at Passaic—to examine their detention experiences in detail.

Our MDC sample of 53 detainees was composed of 19 aliens who were being held at the facility during our site visit in May 2002; a random sample of 30 detainees previously held at the MDC but released or transferred prior to our May 2002 visit; and 4 detainees whose experiences at the MDC were the subject of media articles.

Our Passaic sample of 66 detainees was composed of 30 aliens reportedly held at the facility immediately prior to our site visit in May 2002; a random sample of 30 detainees held at Passaic but released or transferred prior

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[10] In this report we generally refer to all three FBI categories collectively as "of interest," unless otherwise noted.

[11] Nine September 11 detainees were held at both Passaic and the MDC.

to our May 2002 visit; and 6 detainees whose detentions at Passaic were the subject of media articles.[12]

We interviewed 32 detainees in these sample groups—19 housed at the MDC, 13 at Passaic—with their attorneys present if they requested. We also separately interviewed seven immigration attorneys who represented September 11 detainees held at the MDC or Passaic.

In addition, we reviewed the INS Alien Files (known as "A-Files") of 104 detainees from our sample of 119 September 11 detainees: 44 of the 53 detainees in our MDC sample and 60 of the 66 detainees in our Passaic sample.[13] The INS was unable to provide us with the remaining 15 A-Files for these detainees. At the MDC and Passaic, we also reviewed the facilities' records pertaining to the 119 detainees in our samples, including their administrative, disciplinary, and medical files. In addition, we reviewed available FBI Headquarters and FBI field office records for 54 September 11 detainees identified by the INS on January 23, 2002, as having been held longer than 90 days after receiving voluntary departure or removal orders.[14]

We also examined INS and BOP policies and procedures relating to immigration charging, conditions of confinement, and access to counsel. These included agency detention standards as well as specific policies applicable to the MDC and Passaic that were developed prior to and

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[12] The INS provided us with a list of 30 September 11 detainees who were being held at Passaic in April 2002. However, when we conducted our site visit in May 2002, the INS had released or transferred 17 of the 30 detainees.

[13] The A-File, maintained by the INS, contains an alien's U.S. immigration history.

[14] See Chapter 6 for a discussion of final orders of removal.

after the September 11 attacks. We focused on how the BOP and INS implemented these standards, and we examined the actions of managers at the Headquarters and local levels regarding their adherence to these policies. In particular, we examined the following documents during our analysis:

- A database maintained by the INS's Custody Review Unit (CRU) that contains extensive INS records of the investigative and litigation histories of the September 11 detainees;
- A second CRU-maintained database that depicts the detention history of each September 11 detainee;
- A document used by FBI Headquarters to track the status of the detainee clearance process;
- The list of September 11 detainees cleared of connections to terrorism by the FBI New York Field Office (this FBI office conducted clearance investigations on more than 500 of the 762 September 11 detainees);
- FBI Headquarters files for a sample of 54 September 11 detainees maintained by the unit that coordinated the detainee clearance process, as well as corresponding FBI field office files for 46 of those 54 detainees; and
- The BOP's list of September 11 detainees held at the MDC.

In addition, we conducted more than 50 interviews of officials at the FBI, INS, BOP, and the Department of Justice regarding their involvement in developing and implementing the policies concerning the apprehension, detainment, investigation, and adjudication of September

11 detainee cases. Among the officials we interviewed were the Attorney General, the Deputy Attorney General (DAG), the Associate Deputy Attorney General responsible for immigration issues, and various officials in their offices; the Assistant Attorney General for the Criminal Division and attorneys from the Criminal Division involved in the September 11 investigation; the INS Commissioner; the INS Executive Associate Commissioner for Field Operations, the INS General Counsel, and a variety of other INS attorneys and staff; the FBI Director, the former Deputy Director, General Counsel, and other FBI officials; the BOP Director, the BOP's Assistant Director for Correctional Programs, and other BOP attorneys and staff; and officials in the Department's Executive Office for Immigration Review (EOIR).[15] During our fieldwork at the MDC and Passaic, we interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees. In addition, we interviewed managers and employees in the FBI's New York Field Office and Newark Field Office, the INS's New York and Newark District Offices, and the U.S. Attorney's Office for the Southern District of New York.[16]

During our review, we also met several times with representatives of Amnesty International and Human Rights Watch, who offered information and discussed their concerns about the treatment of aliens arrested after September 11. In addition, these organizations helped arrange interviews with some September 11 detainees

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[15] Throughout this report, most individuals are identified using the title they held at the time of the event or action under examination.

[16] Organization charts for the Department, FBI, INS, and BOP are attached at Appendix C.

or their attorneys. We also met with representatives from the American Civil Liberties Union, the Center for Constitutional Rights, the Islamic Circle of North America, and the Legal Aid Society.

## III. Organization Of This Report

This report is organized into ten chapters and begins with this introduction to the report. Chapter 2 describes the initial actions taken by the Department in Washington, D.C., and New York City that affected the arrest, detention, and investigation of the September 11 detainees. It discusses demographic statistics on the September 11 detainees, including their age, citizenship, location, and date of arrest. It also describes the procedure used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the Department's terrorism investigation.

Chapter 3 discusses the charging of September 11 detainees with immigration violations. We identify policies, procedures, and issues that affected the timely charging of the detainees.

Chapter 4 examines the development and implementation of the Department's "hold until cleared" policy for September 11 detainees. It describes a series of operational orders issued by INS Headquarters to manage September 11 detainees. It also examines the processes implemented by the FBI to clear detainees of any connection to terrorism and the ramifications of this procedure on the detainees' length of confinement. We discuss why the FBI New York Field Office and INS New York District Office initially developed a separate list of September 11 detainees unbeknownst to FBI and INS Headquarters officials and the problems this presented. In addition, we describe the impact caused by the Department's decision to require Central Intelligence

Agency (CIA) name checks for each of the detainees. The chapter ends with an examination of the FBI's development of a "watch list" and its process for adding and removing names from that list.

Chapter 5 begins with basic information about federal immigration law, including the charging procedure for immigration violations, bond hearings, and removal proceedings.[17] It then examines the Department's opposition to bond for September 11 detainees and the INS's efforts to keep detainees in custody.

Chapter 6 discusses detainees with final removal and voluntary departure orders, the Department's decision to prevent removal of September 11 detainees until they were cleared by the FBI, and the eventual rescission of the policy. The chapter concludes with a review of the INS's compliance with a requirement that it conduct a review of the continued detention of aliens held for 90 days after they received removal orders. Chapters 7 and 8 examine the conditions of confinement experienced by September 11 detainees at the MDC and Passaic facilities. Chapter 7 evaluates conditions at the MDC, including allegations of physical and verbal abuse, access to legal counsel, medical care, recreation, and other issues. Chapter 8 examines similar issues for September 11 detainees conf ed at Passaic.

In Chapt r 9, we offer a series of recommendations to address the issues discussed in this report. Chapter 10

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[17] The 1996 amendments to the immigration laws combined "deportation" and "exclusion" proceedings into "removal" proceedings. In this report, we use the term "removal proceedings" to refer to all proceedings that sought to deport, exclude, or remove aliens from the United States.

provides our conclusions. The 11 Appendices contain a glossary of names (Appendix A) and terms (Appendix B), organization charts, various memoranda, and sample INS forms.

## CHAPTER TWO
## ARREST AND PROCESSING OF ALIENS IN RESPONSE TO THE SEPTEMBER 11 ATTACKS

This chapter describes the Department's initial response to the terrorist attacks. First, we examine the immediate actions taken by the FBI and INS in New York City to arrest and detain aliens in connection with the terrorism investigation. Next, we describe the Department's philosophy as it related to aliens arrested in connection with the terrorism probe, and we discuss some of the processes developed at FBI and INS Headquarters to coordinate information about these detainee cases. We also provide demographic statistics about the September 11 detainees. In addition, we describe the system used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the terrorism investigation.

### I. Initial Law Enforcement Response

#### A. Initial FBI Response

The FBI took the lead in investigating the September 11 attacks, an investigation that became known as the Pentagon/Twin Towers Bombings investigation, or PENTTBOM. The FBI's investigation initially was affected by the chaotic situation in New York City as a result of the terrorist attacks, which displaced thousands of people from their homes and offices in lower Manhattan. As a result of the attacks, the FBI was forced to evacuate its New York City office in the Javits Federal Building at 26 Federal Plaza, seven blocks from what became known as "Ground Zero." Similarly, the INS was forced to

evacuate all detainees housed at its Service Processing Center at 201 Varick Street in Manhattan's lower West Side.[18]

The FBI's focus immediately after the attacks was whether any of the airplanes remaining in the air posed a threat. Once air traffic over the United States had ceased completely, the FBI turned its attention to locating those responsible for the terrorist attacks and preventing future attacks. During the evening of September 11, the FBI New York Field Office moved telephones, computers, facsimile machines, and other equipment into a temporary command post in a parking garage [REDACTED] [REDACTED] [REDACTED]. In addition to the [REDACTED] [REDACTED] site, the FBI created command posts [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] near midtown Manhattan and at FBI offices in Queens and Long Island, New York.

With the help of the airlines and the INS, the FBI quickly determined the names used by the hijackers and immediately began to pursue leads related to them. During this initial period, the overall terrorism investigation was coordinated from the FBI's high-security Strategic Information and Operations Center (SIOC) located at FBI Headquarters in Washington, D.C. The FBI Headquarters in Washington, D.C. coordinated the New York aspects of the terrorism investigation through the FBI's New York Joint Terrorism Task Force (JTTF), a group

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[18] INS Service Processing Centers process and detain illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country. A detainee could be held at a Service Processing Center from one day to several years.

composed of a variety of law enforcement agencies including the INS, the New York Police Department, and the Drug Enforcement Administration.[19] In addition, prosecutors from the U.S. Attorney's Office for the Southern District of New York (SDNY) and the Eastern District of Virginia, in conjunction with the Department's Criminal Division, worked closely with the New York JTTF to direct major aspects of the terrorism investigation from both Washington, D.C., and New York City.

The day after the attacks, officials at FBI Headquarters began developing a "watch list" that initially was designed to identify potential hijackers and other individuals who might be planning additional terrorist acts once air travel resumed. By September 14, the FBI had forwarded the watch list, which at this point contained more than 100 names, to the Federal Aviation Administration, commercial airlines, FBI field offices, the U.S. Border Patrol, the U.S. Customs Service, and 18,000 state and local police departments across the country. According to FBI Director Robert Mueller, the watch list ultimately contained the names of "individuals the FBI would like to

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[19] Each of the FBI's 56 domestic field offices now leads a JTTF in its respective geographic area of responsibility. The FBI's New York Division formed the first JTTF in 1980. Participants in JTTFs include the INS; U.S. Secret Service; Naval Criminal Investigative Service; U.S. Marshals Service; U.S. Customs Service; Bureau of Alcohol, Tobacco, and Firearms; U.S. Department of State/Diplomatic Security Service; Offices of Inspectors General; Postal Inspection Service; Internal Revenue Service; Department of Interior Bureau of Land Management; Air Force Office of Special Investigations; U.S. Park Police; Federal Protective Service; Defense Criminal Investigative Service; and other federal, state, and local law enforcement agencies.

talk to because we believe they have information that could be helpful to the [PENTTBOM] investigation."[20]

The FBI allocated massive resources to the September 11 terrorism investigation. Within 3 days of the attacks, more than 4,000 FBI special agents and 3,000 support personnel were assigned to work on the PENTTBOM probe. Six days after the attacks, FBI Director Mueller reported that more than 500 people representing 32 federal, state, and local law enforcement agencies were working 24 hours a day at FBI Headquarters. By September 18, 2001, 1 week after the attacks, the FBI had received more than 96,000 tips or potential leads from the public, including more than 54,000 through an Internet site it established for the PENTTBOM case, 33,000 that were forwarded directly to FBI field offices across the country, and another 9,000 tips called into the FBI's toll-free "hotline."

### B. Department of Justice Response

In response to the September 11 attacks, the Attorney General directed all Department of Justice components to focus their efforts on disrupting any additional terrorist threats. As articulated in a September 17, 2001, memorandum to all United States Attorneys from Attorney General Ashcroft, the Department sought to prevent future terrorism by arresting and detaining violators who "have been identified as persons who participate in, or lend support to, terrorist activities. Federal law enforcement agencies and the United States Attorneys' Offices will use every available law enforcement tool to incapaci-

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[20] FBI Director Robert Mueller, Press Conference at FBI Headquarters (September 14, 2001). We discuss the development and eventual dissolution of this watch list in greater detail in Chapter 4.

tate these individuals and their organizations." Given the identities of the September 11 terrorists, the Department recognized from the earliest days that its terrorism investigation had a significant immigration law component.

The Attorney General summarized the Department's new focus in a speech he gave to the U.S. Conference of Mayors on October 25, 2001:

> Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the Republic . . .
>
> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.
>
> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.
>
> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street. If suspects are found not to have links to terrorism or not to have violated the law,

> they are released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.

The Attorney General told the OIG that he instructed that if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks.

The Deputy Attorney General explained to the OIG that the threat presented by terrorists who carried out the September 11 attacks required a different kind of law enforcement approach. He stated that the Department needed to disrupt such persons from carrying out further attacks by turning its focus to prevention, rather than investigation and prosecution.

Michael Chertoff, the Assistant Attorney General for the Criminal Division, told the OIG that within days of the attacks it became evident that some aliens encountered in connection with the PENTTBOM investigation were "out of status" in violation of the law—a matter that fell within the jurisdiction of the INS. He stated the Department's policy was to "use whatever means legally available" to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed. In some instances, he noted, that would mean detaining aliens on immigration charges, and in other cases criminal charges. Chertoff said he did not believe that the Department had a blanket policy to go with one or the other, if both were possible. He said he understood the Department would use whichever charge was most "efficacious." He stated that he was involved in meetings with the Attorney General, the Deputy Attorney General, and the FBI Director at which this philoso-

phy was discussed, but he added that, from the beginning, there was an insistence from senior Department officials that things be done legally. Chertoff explained that his deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division.

Fisher told the OIG that during the fall of 2001 she spent the "majority" of her time on terrorism issues, some of which involved illegal aliens who presented a potential terrorism threat. She recalled that Chertoff told her "we have to hold these people until we find out what is going on." She said she understood that the Department was detaining aliens on immigration violations that generally had not been enforced in the past.

**C. New York FBI's Response**

The FBI Field Office in New York City and its JTTF received thousands of leads from the public related to terrorism in the weeks after September 11. Staff at the New York JTTF command post entered the leads into an FBI database that assigned each PENTTBOM lead a unique number. Leads then were sent to one of the four FBI command posts in the New York City area and assigned to a JTTF team that included FBI and INS agents, among other law enforcement personnel.

Many of the leads pursued by the JTTF in New York City and elsewhere across the country involved aliens, many from countries with large Arab or Muslim populations. If JTTF teams in New York encountered an illegal alien in the course of pursuing a PENTTBOM lead—whether or not the alien was the subject of the lead—the INS agent on the team examined the alien's immigration and identity documents to determine whether the alien was lawfully in the United States. If an INS agent was not present during the JTTF's initial interview of the individual, the team notified the INS New York District

Office, which dispatched an INS agent to determine the alien's immigration status. The team would arrest any alien encountered in the course of investigating a JTTF or PENTTBOM lead who was found to be in the country illegally.

Many of the aliens arrested under these circumstances were put into a special category referred to as persons "of interest" to the FBI. Their names were placed on a list referred to as "the INS Custody List." The INS and FBI did not always agree on which aliens should be included on the list, and we found that the cases were not handled uniformly nationwide. The complexities of how a person came to be included in this special category of immigration detainees is discussed in detail in Chapter 4, where we also examine some of the problems that arose from creation of this category of detainees. Moreover, as we describe later in this report, being labeled "of interest" had significant ramifications for the detainees' place and length of detention. The Department severely limited these detainees' ability to obtain bond, and detainees on this list could not be removed from the United States without a written "clearance letter" from the FBI. These requirements created substantial obstacles for detainees who sought release or removal. We describe these issues in more detail in the chapters that follow.

In conjunction with the New York FBI's JTTF, the U.S. Attorney's Office for the SDNY immediately began to investigate the terrorist attacks. David Kelley, the Deputy United States Attorney for the SDNY, helped direct the search warrants, subpoenas, and material witness warrants in the Southern District and also participated in the supervision of the PENTTBOM task force in Washington, D.C. Within one to three days after the attacks, Kelley explained, he focused on individuals "really"

of "investigative interest" (as opposed to those simply labeled "special interest" by the FBI or the INS). He explained that individuals of "genuine investigative interest" were people connected to a subject or target of the investigation, such as a person whose telephone number was linked to a hijacker, or a person who lived in a building near a location of high interest.

[PAGES 15 THROUGH 16 OMITTED]

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## III. Assignment To A Detention Facility

Our review determined that September 11 detainees arrested in New York City generally were confined at the MDC or transported to Passaic and other INS contract facilities in northern New Jersey. The housing determination for a September 11 detainee was the result of a two-step process that began with the FBI's assessment of the detainee's possible links to terrorism. The FBI provided this assessment to the INS, which made the actual housing determination. Witnesses told the OIG that the INS's determination was based almost solely on the FBI's assessment.

Where a September 11 detainee was housed had significant ramifications on the detainee's detention experiences. Detainees housed at the MDC (discussed in Chapter 7) experienced much harsher confinement conditions than those held at Passaic (discussed in Chapter 8). The September 11 detainees held at the MDC were locked down 23 hours a day, were placed in four-man holds during movement, had restricted phone call and visitation privileges, and had less ability to obtain and communicate with legal counsel.

### A. FBI Assessment

The first part of the process to determine where a September 11 detainee would be confined began with the FBI's initial assessment of the detainee's links to the PENTTBOM investigation or ties to terrorism. The FBI assessed a detainee as "high interest," "of interest," or "interest undetermined." The "high interest" detainees were considered by the FBI to have the greatest potential to be linked to the PENTTBOM investigation or to terrorism. The FBI believed the "of interest" detainees might have some terrorist connections. For the "interest undetermined" detainees, the FBI could not affirmatively state that the detainee did not have a connection to the September 11 attacks. As we discuss in Chapter 4, this assessment was not based on specified criteria or consistently applied to all detainees. In addition, the INS was not authorized to release a September 11 detainee until the FBI completed its clearance investigation because of the concern about inadvertently releasing a terrorist. Therefore, the FBI in New York City never labeled a detainee "no interest" until after the clearance process was complete.

Almost all the September 11 detainees in our review were arrested by the INS. Often an FBI agent present at the arrest provided the INS with a verbal assessment of the FBI's level of interest in the particular detainee. However, we found that this initial assessment often was based on little or no concrete information tying the detainee to the September 11 attacks or terrorism.

### B. INS Housing Determination

After the INS arrested September 11 detainees, they were taken to an immigration processing center, such as the INS's Service Processing Center on Varick Street in New York City, to complete arrest and initial detention

processing (after the attacks the Center no longer housed detainees, but remained open for processing). The FBI New York Field Office identified its level of investigative interest in the detainee to the FBI's International Terrorism Operations Section (ITOS) at FBI Headquarters, which informed, usually verbally, the INS's National Security Unit (NSU). The information passed to the NSU by the FBI included a request that detainees of "high interest" be housed at the MDC.

From September 11 to 21, 2001, INS Executive Associate Commissioner for Field Operations Michael Pearson made all decisions regarding where to house September 11 detainees. According to Daniel Cadman, the NSU Director, NSU staff provided briefings to Pearson that consisted of the FBI's assessments, other derogatory information obtained during the investigation (if any), and the security risk posed by the detainee (if known). Based on this information, Pearson decided whether a detainee should be confined at a BOP facility (such as the MDC), an INS facility, or an INS contract facility (such as Passaic). Pearson's decision was relayed to the INS New York District, which transferred the detainees to the appropriate facility.

The INS's housing determination process changed on September 21, 2001, when the INS created the Custody Review Unit (CRU) at Headquarters and appointed three INS District Directors to make detainee housing determinations based on input provided by the FBI. At this point, Pearson removed himself from this decision-making process.

We were also told that some detainee housing determinations were made outside the process described above. Dan Molerio, Assistant District Director for Investigations in the INS New York District, said three

Assistant U.S. Attorneys from the Southern District of New York detailed to the FBI Headquarters contacted him on a number of occasions and identified "high interest" detainees held by the INS in New York. Molerio said the FBI's Assistant Special Agent in Charge for Counterterrorism in New York also called him on several occasions about "high interest" detainees. Molerio said when the FBI told him a detainee was "high interest," he would ensure that the detainee was sent to the MDC.

In sum, even though the INS established a process for making housing determinations, the INS's decision was based almost entirely on the FBI's assessment.

### C. BOP Confinement Decisions

Soon after the September 11 attacks, the BOP made several decisions regarding the detention conditions it would impose on the September 11 detainees. These decisions (discussed in more detail in Chapter 7) included housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU), implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) inmates. According to Michael Cooksey, the BOP's Assistant Director for Correctional Programs, the BOP decisions were based on the BOP's concerns about potential security risks posed by the September 11 detainees. He said the BOP made the decision to impose strict security conditions in part because the FBI provided so little information about the detainees and because the BOP did not really know whom the detainees were. He said the BOP chose to err on the side of caution and treat the September 11 detainees as high-security detainees. He said that the Department was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities. Cooksey said the BOP did not treat the

September 11 detainees different than "regular" high-security inmates.

BOP Director Kathy Hawk Sawyer told the OIG that officials in the Deputy Attorney General's Office contacted her to discuss specific detainees' ability to communicate with other inmates and with the outside world. She said she understood from these conversations that the Department wanted the BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC.[23]

**D. Department of Justice's Role**

Witnesses told us that the Department of Justice had little input into where the detainees were held. For example, Chertoff, the Assistant Attorney General in charge of the Criminal Division, said he did not have any information about where or how the detainees would be held, with the exception of one conversation in which he was told that an alien had claimed he was hurt by a guard. He said that he was later told that the report was inaccurate, and that the alien had not made such an accusation. David Israelite, Deputy Chief of Staff to the Attorney General, said he could not recall any discussions of holding people "incommunicado" or any discussion of where detainees should be held. He also recalled one allegation of mistreatment being called to the attention of the Attorney General, who he said asked staff to look into the incident.

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[23] We discuss Hawk Sawyer's conversations with Christopher Wray, Principal Associate Deputy Attorney General, and David Laufman, Chief of Staff to the Deputy Attorney General, in Chapter 7.

Alice Fisher, the Deputy Assistant Attorney General who was in charge of terrorism issues for the Criminal Division, stated that she had no information about which facility a detainee would go to or the conditions that would be imposed on the detainees. She noted that there was an "effort" to accommodate the needs of the Assistant U.S. Attorneys who were conducting the grand jury investigation into the attacks. David Kelley, the Deputy U.S. Attorney for the SDNY who played an important role in the September 11 investigation, said he had no input into where people would be confined, except that a person might be moved to the New York area if he was needed to testify. An Assistant U.S. Attorney from the SDNY who worked on the terrorism investigation explained that he generally did not have input into where detainees would be held. He recalled being frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk and those detained aliens who were uninvolved witnesses.

[PAGES 21 THROUGH 22 OMITTED]

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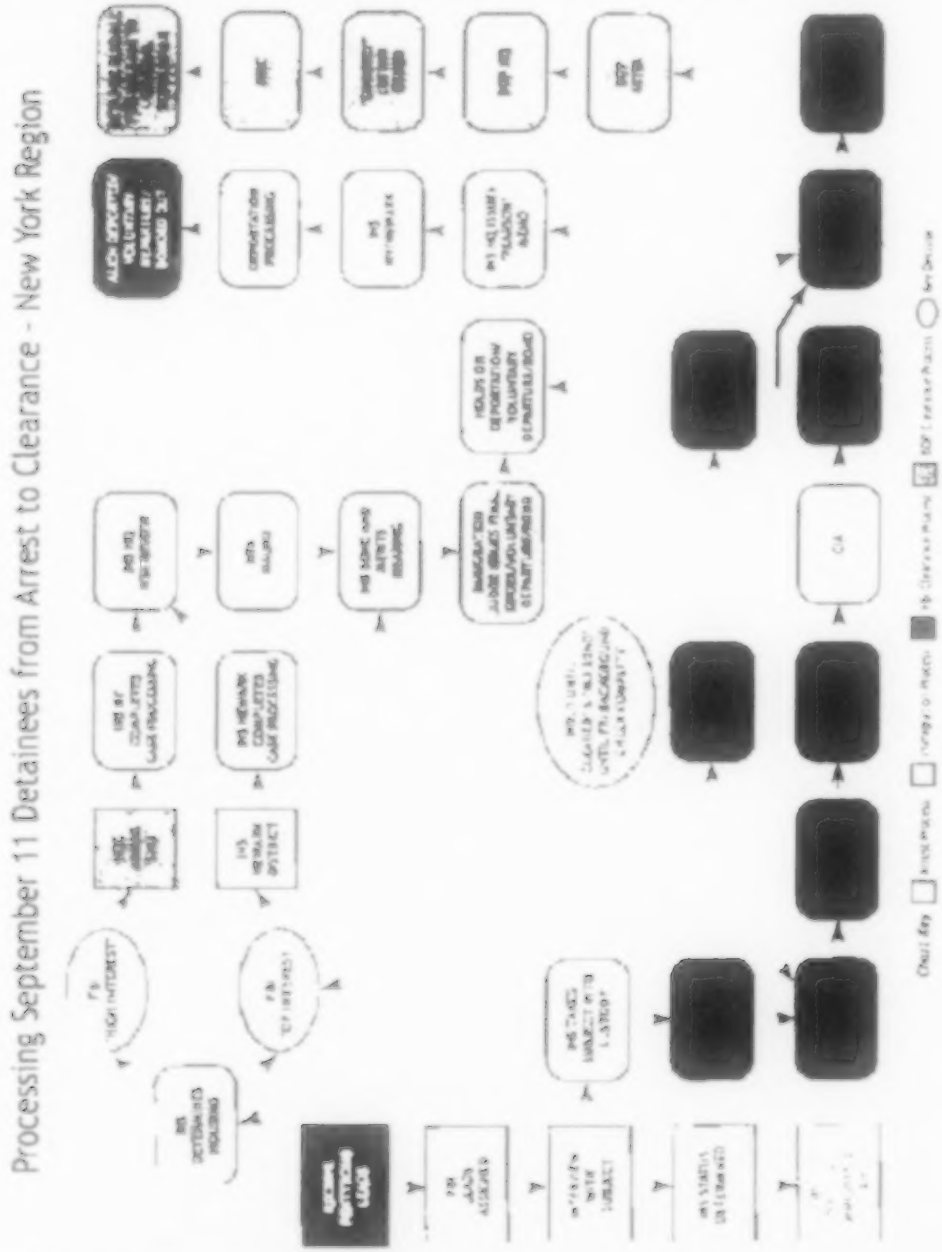
## V. Processing Of September 11 Detainees From Arrest To Clearance

Perhaps the factor that most significantly affected the length of a September 11 detainee's confinement was the nature of the multi-step, multiagency process used by the Department for handling aliens detained as part of its terrorism investigation. The OIG developed the following flow chart (Figure 6) to depict the process for handling September 11 detainees from their initial encounter with law enforcement authorities through their release from custody or removal from the United States. The chart displays the process used by the Department to investigate PENTTBOM leads, arrest September 11 de-

tainees, determine where to house them, conduct detainee clearance investigations, complete the INS hearings and removal proceedings, and remove the detainees.[24]




[24] The chart depicts the process for September 11 detainees held at the MDC or Passaic. Some detainees only went through part of this process, depending on their individual immigration cases and the progress of their FBI clearance checks. The "BOP Process" shown in the chart applied only to those detainees housed at the MDC.

The following steps describe the procedures depicted by this chart:

Arrest Process:

1. U.S. law enforcement received information regarding an individual who may have connections to the September 11 attacks or terrorism in general (a PENTTBOM lead).

2. If deemed worthy of investigation, the responsible FBI field office assigned the lead for investigation (in New York City, generally to the JTTF).

3. Law enforcement personnel interviewed the individual, and an INS agent determined his immigration status. The subject was released if the FBI expressed no investigative interest related to the terrorism probe and the individual had not violated his immigration status.

4. If the INS agent determined that the alien was in violation of immigration status, the INS agent took the alien into custody and asked the FBI for an assessment of its interest in the alien with respect to the terrorism investigation.

5. The FBI determined its level of interest in the alien: generally "of interest," "high interest," "no interest," or "undetermined." Based on this assessment by the FBI, "high interest detainees" were sent to BOP high-security facilities, while "of interest" and "interest unknown" detainees generally were housed in less restrictive facilities, such as county jails under contract to the INS.

FBI Clearance Process:

1. After the FBI received the detainee's A-File from the INS, the FBI initiated detainee clearance investigations and notified the SIOC Working Group that the alien was in custody. The Department had issued a standing

order that detainees were not to be released until clearance investigations were completed.

2. The SIOC Working Group requested CIA checks on the detainee.

3. If clearance investigations and CIA checks on the detainee were clear, the detainee was determined to be of "no interest" to the FBI.

4. The FBI's ITOS decided the final clearance of a September 11 detainee and issued a formal FBI clearance letter, signed by the ITOS Section Chief. Until the FBI issued the clearance letter, the Department did not allow the INS to remove the detainee.

5. The SIOC Working Group forwarded the FBI clearance letter to the INS or BOP, whichever agency was holding the alien. If the BOP was holding the alien, BOP Headquarters then issued its clearance memorandum to the BOP facility, called a "Cooksey memorandum," notifying the appropriate warden that a detainee was eligible for release into the facility's general population.[25]

INS Immigration Process:

1. After INS Headquarters review, the INS District Director in the INS district where the September 11 detainee was arrested issued the charging document to the detainee (known as the "Notice to Appear" or NTA) that describes the immigration laws the detainee has allegedly violated. The INS initially held all September 11 detainees without bond, but the detainees were able to request bond re-determination hearings before an Immi-

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[25] Cooksey memoranda were signed by Michael Cooksey, the BOP Assistant Director for Correctional Programs.

gration Judge after receiving the NTA and accompanying documents.

2. An Immigration Judge conducted a hearing on the detainee's alleged immigration violations (a "merits hearing") to determine whether the detainee should be removed from the United States.

3. The Immigration Judge issued a final order removing the detainee or permitting the detainee to leave the country voluntarily.

4. INS Headquarters issued its clearance memorandum—known as the "Pearson memorandum"—to the appropriate INS Region Office.[26] Issuance of the INS clearance letter was predicated on the INS receiving a clearance letter from the FBI stating that it had "no interest" in the detainee, as described above.

5. The alien was either removed from the United States, allowed to depart voluntarily, or released from INS custody.

The impact of each of these procedures on the length of the September 11 detainees' detentions and their conditions of confinement is discussed in detail in the chapters that follow.

[PAGES 27 THROUGH 36 OMITTED]

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## CHAPTER FOUR
## THE CLEARANCE PROCESS

This chapter examines the Department's process for clearing the September 11 aliens who were detained be-

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[26] Pearson memoranda were signed by Michael Pearson, then the INS Executive Associate Commissioner for Field Operations.

cause of possible links to terrorism. Specifically, we examine how problems with the process significantly lengthened the time detainees spent in custody. First, we discuss the origins of the Department's directive that all September 11 detainees be held until the FBI cleared them of any connection to terrorism. Next, we examine the series of Operational Orders issued by INS Headquarters to its field offices in the weeks immediately following the September 11 attacks that sought to address the growing number of detainees arrested in connection with the PENTTBOM investigation.

We then turn to the process developed by the Department to clear the detainees of any connection to terrorism. In particular, we examine the activities of the squad created by the FBI New York Field Office that conducted most of the clearance investigations of September 11 detainees. We then describe the problems caused when the INS New York District failed to inform Headquarters of the arrest of hundreds of aliens "of interest," and the discovery of a separate list of September 11 detainees kept by the FBI New York Field Office in the weeks immediately following the terrorist attacks, a list apparently unknown to FBI and INS officials in Washington, D.C. who were attempting to coordinate all September 11 detainee cases. We also discuss the effects of detainee name checks in databases maintained by the Central Intelligence Agency (CIA). We end by examining the FBI's development of a "watch list" of potential terrorist suspects and its process for adding and removing names from that list.

## I. "Hold Until Cleared" Policy

### A. Origins of Policy

Officials from the FBI and the INS told the OIG they clearly understood from the earliest days after the ter-

rorist attacks that the Department wanted September 11 detainees held without bond until the FBI cleared them of any connections to terrorism. This "hold until cleared" policy was not memorialized in writing, and our review could not determine the exact origins of the policy. However, this policy was clearly communicated to INS and FBI officials in the field, who understood and applied the policy.

We found that the directive was communicated to the INS and the FBI by a number of Department officials, including Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues. Michael Pearson, the INS Executive Associate Commissioner for Field Operations, said that Levey called a senior INS official the week after the September 11 attacks and directed that no INS detainees should be released without being cleared by the FBI. Pearson said he also received instructions from INS Commissioner James Ziglar that none of the detainees should be released by the INS until they had been cleared by the FBI of any connections to terrorism. Pearson told the OIG that he passed these instructions along to employees at INS Headquarters's units assigned to handle September 11 detainee cases.

Similarly in the FBI, our interviews and review of documents confirm that FBI officials understood and applied the "hold until cleared" policy. For example, an October 26, 2001, electronic communication (EC) (similar to an e-mail) from an FBI agent in the SIOC to FBI field offices stated that, "Pursuant to a directive from the Department of Justice, the INS will only remove individuals from [the special interest] list after the INS has received a letter from FBIHQ [FBI Headquarters] stating that the FBI has no investigative interest in the detainee."

In addition, an attorney with the FBI's Office of General Counsel who worked on the SIOC Working Group told the OIG that it was understood that the INS was holding September 11 detainees because the Deputy Attorney General's Office and the Criminal Division wanted them held. She said the Deputy Attorney General's Office took a "very aggressive stand" on this matter, and the Department's policy was clear even though it was not written.

Levey told the OIG that the idea of detaining September 11 detainees until cleared by the FBI was "not up for debate." He said he was not sure where the policy originated, but thought the policy came from "at least" the Attorney General.

A Senior Counsel in the Deputy Attorney General's Office who worked closely with Levey on immigration matters ("Senior Counsel to the DAG") stated in her response to the draft of this report that those involved in the discussion of the process, including attorneys from the INS, OIL, and the Criminal Division (including TVCS), were aware that the strategy had risks, and clearly anticipated the filing of habeas corpus petitions because of the position the Department planned to take that any illegal alien encountered pursuant to a PENTTBOM lead should be detained until cleared by the FBI. She noted that this was "unchartered [*sic*] territory." On September 27, 2001, the Senior Counsel sent an e-mail to David Ayers, Chief of Staff to the Attorney General, on September 27, 2001, that discussed this "hold until cleared" policy. The e-mail described the "strategy for maintaining individuals in custody." The document attached to the e-mail, entitled "Maintaining Custody of Terrorism Suspects," begins with a "Potential AG Explanation" that states:

> The Department of Justice (Department) is utilizing several tools to ensure that we maintain in custody all individuals suspected of being involved in the September 11 attacks without violating the rights of any person. If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant. Many people believed to be involved in the attacks, however, are not present legally and they may be detained, at least temporarily, on immigration charges. As of September 27, 2001, the Immigration and Naturalization Service (INS) was detaining without bond 125 aliens related to this investigation on immigration charges.

The document then describes plans for handling bond hearings and coordination efforts among the FBI, INS, and Criminal Division to ensure that September 11 detainees would remain in custody. Levey told us this document was drafted to enable the Attorney General to provide an explanation as to how, within the bounds of the law, the Department could hold and not release aliens who were suspected of terrorism.

Other senior Department officials confirmed that the directive to hold the September 11 detainees without bond stemmed from discussions at the highest levels of the Department. Assistant Attorney General Michael Chertoff told the OIG that in the early days after the terrorist attacks the issue was discussed among the Attorney General, Deputy Attorney General, and FBI Director that detention should be sought of a charged person "if there is a link to the hijackers and we are not able to assure that the person is not a threat and there is a legal violation." Alice Fisher, a Deputy Assistant Attorney

General in the Criminal Division and a participant in the SIOC Working Group, told the OIG that Chertoff told her that "we have to hold these people until we find out what is going on" and that, in some cases, they could use immigration charges to keep the detainees in custody.

David Laufman, Chief of Staff to the Deputy Attorney General, told the OIG that he recalled a meeting which INS representatives attended soon after the terrorist attacks that included a discussion of whether potential immigration violations could be "leveraged" against September 11 detainees when there was insufficient information for criminal cases. He added that it was recognized that, "if we turn one person loose we shouldn't have, there could be catastrophic consequences." He said he recalls, however, asking Levey to take whatever steps were appropriate to expedite clearance by the FBI and the CIA.

Daniel Levin, Counselor to the Attorney General, told the OIG that he could not say for certain when the clearance policy was developed or at what level. He described a "continuous meeting" for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI Director, and Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed.

The Deputy Attorney General told the OIG that he remembers the "decision to hold without bond" being discussed, and that he was in favor of requiring the clearance process "within the bounds of the law." He explained that the threat after September 11 was a different threat that required a different approach. He said that investigating and prosecuting could not be the focus, as it had been before the terrorist attacks, and the Department needed to aggressively protect public safety,

within the bounds of the law, by disrupting and preventing further incidents.

FBI Director Mueller stated that he did not recall being involved in any discussions about the creation of the "hold until cleared" policy, although he learned about the policy later.

When asked about a "hold until cleared" policy, the Attorney General told the OIG that the Department would want to know whom the detainees were if it was getting ready to remove them. He noted the inherent difficulty involved in conducting a "clearance" process, in that clearing someone is akin to "proving a negative." He also noted that the Department does not assert that it could hold anyone "forever" without regard to a predicate offense. However, the Attorney General said he had no reluctance to do those things legally permissible to detain someone who had violated the law.

**B. Implementation of Policy**

From the first days after the terrorist attacks, the INS adopted the term "of interest" to identify aliens arrested on immigration violations in connection with the September 11 investigation who needed to be cleared by the FBI of any connections to terrorism before they could be released or removed from the United States. Detainees who were not "of interest" to the FBI's terrorism investigation did not have to be cleared by the FBI and could be processed according to normal INS procedures. The FBI was responsible for determining whether an alien arrested in connection with a PENTTBOM lead on immigration charges should be further investigated. If it found further investigation warranted, then the alien was "of interest" and the FBI notified the INS of that determination. However, there were many cases where the FBI told the INS that it could not determine

at the outset whether it had an interest in the alien. In cases of affirmative FBI interest or a statement that interest could not be determined, the INS treated the alien as "of interest."

Problems quickly arose upon implementation of the "hold until cleared" policy for aliens arrested on PENTTBOM leads, because the Department and the FBI did not develop clear criteria for determining who was, in fact, "of interest" to the FBI's terrorism investigation. From our interviews, we determined that, for the most part, aliens were deemed "of interest" based on the type of lead the law enforcement officers were pursuing when they encountered the aliens, rather than any evidence that they were terrorists. In the New York City area, for example, anyone picked up on a PENTTBOM lead was deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the strength of the evidence or the origin of the lead. A PENTTBOM lead was considered any lead that was in any way connected to the World Trade Center or Pentagon investigation, or a lead that raised the specter of "suspicious activity" by an alien who might possibly be a terrorist. However, there need not be any evidence of connection to the terrorists or to the World Trade Center or Pentagon bombings for a lead to be considered a PENTTBOM lead. Any illegal alien encountered by New York City law enforcement officers following up a PENTTBOM lead—whether or not the alien turned out to have a connection to the September 11 attacks or any other terrorist activity—was deemed to be a September 11 detainee.

In a January 2002 court proceeding, the Department defined the term "September 11 detainees" as "individuals who were originally questioned because there were indications that they might have connections with, or

possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them."[36]

Many of the persons arrested as part of the PENTTBOM investigation were aliens unlawfully present in the United States either because they entered this country illegally or because they entered legally but remained after their authorization to do so had expired. It is unlikely that most if not all of the individuals arrested would have been pursued by law enforcement authorities for these immigration violations but for the PENTTBOM investigation.[37] Some appear to have been arrested more by virtue of chance encounters or tenuous connections to a PENTTBOM lead rather than by any

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[36] This definition was contained in the declaration of James Reynolds, Chief of the Terrorism and Violent Crime Section in the Department's Criminal Division (the "Reynolds Declaration"), submitted by the Department on January 11, 2002, in support of the Department's summary judgment motion in connection with the case entitled *Ctr. for Nat'l Sec. Studies* v. *U.S. Dep't of Justice*, 01-civ-2500 (D.D.C. filed Dec. 6, 2001).

[37] The September 11 attacks focused renewed attention on the importance of knowing when nonimmigrant visitors enter and depart the United States. The OIG has reported previously on the INS's efforts to identify and remove nonimmigrant overstays, most recently in an April 2002 follow-up report that found the INS has made little progress to effectively address the issue. The follow-up review concluded that the INS still did not have a reliable system to track overstays, did not have a specific overstay enforcement program, and could not provide accurate data on overstays. See Follow-Up Report on INS Efforts to Improve the Control of Non-Immigrant Overstays, Report No. I-2002-006, April 2002, available at http://www.usdoj.gov/oig/inspection/I-2002-006/report.pdf.

genuine indications of a possible connection with or possession of information about terrorist activity.

For example, on September 15, 2001, New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. Nonetheless, they were arrested and remained detained as September 11 detainees. Another alien was arrested on September 22, 2001, because the phone company mistakenly put his phone calls home to [REDACTED] on the bill of a New York [REDACTED] office and the [REDACTED] office called to report the "suspicious" bill. The alien was arrested, detained on immigration charges, and considered a September 11 detainee. He was not cleared until January 9, 2002. Another Middle Eastern alien was arrested because he went to a car dealership on September [REDACTED], 2001, and was anxious to purchase a car right away. He put down a [REDACTED] deposit on a car but did not return on September [REDACTED], 2001, for the car as he agreed he would. He was arrested on September 29, 2001 and was not cleared until April 29, 2002. Another alien was arrested because a person called the FBI a few days after the terrorist attacks to say that six to ten weeks prior, the [REDACTED] [REDACTED] [REDACTED] [REDACTED] she hired through [REDACTED] [REDACTED] [REDACTED], who was an [REDACTED] male, told her that he was a licensed pilot and was saving to go to flight school in the U.S. to learn to fly commercial

jets. He was arrested on September 24, 2001, and not cleared until February 12, 2002.[38]

In the days immediately following the September 11 attacks, before the clearance process was centralized in Washington, D.C., the INS could obtain an indication of "no interest" from an FBI field office and proceed to process the alien as a "regular" immigration case. In mid-September 2001, however, the Department instructed the INS that before it could treat a September 11 detainee as a "normal" immigration case, the INS needed to obtain a clearance letter from Michael Rolince, Chief of the FBI's International Terrorism Operations Section (ITOS) in its Counterterrorism Division.[39] According to several witnesses with whom we spoke, the FBI and the Department believed that the PENTTBOM investigation should be viewed as a "mosaic" that contained countless individual pieces of information and evidence, and field offices would not be in a position to determine if any single item was of significance to this mosaic. Therefore, it was believed that FBI Headquarters would have a broader perspective on the PENTTBOM investigation and would be in a better position to make an assessment of whether an individual alien detained in connection with a PENTTBOM lead was "of interest" to the investigation. However, as we describe below, this centralized clearance process was slow and insufficiently staffed, resulting in many detainees being held for long periods of time while no clearance investigations were being conducted.

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[38] Other examples of tenuous PENTTBOM leads that led to detainee arrests and their designation as "of interest" to the September 11 investigation were described in Chapter 2.

[39] A copy of a "Rolince" clearance letter is attached at Appendix E.

[PAGES 44 THROUGH 110 OMITTED]

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# CHAPTER SEVEN
# CONDITIONS OF CONFINEMENT AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK

## I. INTRODUCTION

Almost 60 percent of the 762 aliens detained in connection with the Government's investigation of the September 11 terrorist attacks were arrested in the New York City area. As discussed previously, the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated.

Aliens arrested by the INS on immigration charges who were deemed by the FBI to be of "high interest" to its terrorism investigation were held in high-security federal prisons across the country, such as the Federal Bureau of Prisons's (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York.[88] Overall, the BOP confined 184 September 11 detainees in its facilities nationwide. A total of 84 detainees determined by the FBI

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[88] The MDC is a 9-story BOP facility in Brooklyn that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing. On December 10, 2002, the MDC housed 2,441 men and 181 women.

to have a possible connection with the PENTTBOM investigation or terrorism in general were housed at the MDC from September 14, 2001, to August 27, 2002.

Generally, aliens deemed by the FBI to be "of interest" or "of undetermined interest" to the Government's terrorism investigation were detained in lower security facilities, such as the Passaic County Jail in Paterson, New Jersey (Passaic). From September 2001 to May 2002, 400 September 11 detainees were confined in Passaic.

This chapter examines the conditions of confinement for September 11 detainees held at the MDC, while the next chapter examines conditions experienced by September 11 detainees at Passaic. As we discuss in these two chapters, the FBI's initial assessment of its level of interest in specific September 11 detainees directly affected the detainees' conditions of confinement within the institution and their access to telephones, legal counsel, and their families.

In this chapter, we discuss the BOP's initial communications blackout after the terrorist attacks; its classification of September 11 detainees as "witness security" inmates; the MDC's administrative maximum (ADMAX) Special Housing Unit (SHU), a special high-security section of the facility where September 11 detainees were held until cleared by the FBI of involvement with terrorism; the MDC's process for transferring September 11 detainees from the ADMAX SHU to the facility's general population; the detainees' access to legal counsel; allegations of physical and verbal abuse made by detainees against MDC staff; and other condition of confinement issues, including consular visits, recreation opportunities, medical care, and lighting conditions in the ADMAX SHU cells.

## II. Initial Communications Blackout After September 11

Immediately after the September 11 attacks, the BOP ordered all detainees who were "convicted of, charged with, associated with, or in any way linked to terrorist activities" to be placed in the highest level of restrictive detention. Also, MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's "call." Detainees held in the MDC's ADMAX SHU were subjected to the most restrictive conditions of confinement authorized by BOP policy, including "lockdown" for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls.

Hawk Sawyer told the OIG that the detainees were held under these restrictive detention conditions, in part because the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities. She said the policies applied to the September 11 detainees were not new policies created specially for the detainees. Rather, the policies were longstanding BOP practices for housing inmates who presented special security concerns. She noted that on any given day persons are detained by the BOP in conditions exactly like those applied to the September 11 detainees.

Hawk Sawyer informed the OIG that the Department did not initially give the BOP any guidance on how to confine the detainees. However, she said the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christo-

pher Wray, called her during the weeks after September 11 with concerns about detainees' ability to communicate both with those outside the facility and with other inmates. Hawk Sawyer said she discussed specific September 11 detainees during these conversations as well as the detainees in general. Hawk Sawyer stated that Laufman's and Wray's concerns about the detainees' ability to communicate both with those outside the facility and with other inmates confirmed for her that the BOP's initial decision to restrict detainee communications with persons outside the facility and to isolate them from the general inmate population and from each other was appropriate.

Hawk Sawyer also told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications—including legal and social calls or visits—as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

Laufman, Chief of Staff to the Deputy Attorney General, confirmed the substance of the conversations described by Hawk Sawyer. He told the OIG that he urged the BOP to exercise the full scope of its discretion to sequence detainee outside contacts on the "back end" of the BOP's discretion. Wray stated that when he contacted Hawk Sawyer about some specific criminal inmates connected to terrorism who were already in BOP custody at the time of the September 11 attacks, he discussed hav-

ing these inmates placed under the most secure conditions possible. He stated that while he does not recall giving any specific instructions, he stated that the "spirit" of his comments was that the BOP should, within the bounds of the law, push as far toward security as they could.

On September 12, 2001, David Rardin, the BOP's Northeast Region Director (which includes the MDC), directed wardens in his region not to release inmates classified by the BOP as "terrorist related" from restrictive detention in SHUs "until further notice." Rardin also ordered a communications blackout for September 11 detainees during a telephone conference call with all Northeast Region Wardens on September 17, 2001. Consequently, MDC staff did not allow detainees to receive telephone calls, visitors, or mail, or to place telephone calls or send mail until the BOP received information concerning the security risks presented by the detainees.

We could not determine with any certainty the length of the communications blackout that affected September 11 detainees in BOP facilities. However, based on multiple witness interviews, the blackout appears to have lasted from several days to several weeks. According to Michael Cooksey, the BOP Assistant Director for Correctional Programs, all September 11 detainees initially were held incommunicado, but after 8 to 10 days detainees were permitted limited attorney and social contacts. John Vanyur, Senior Deputy Assistant Director in the BOP's Correctional Programs Division, told the OIG that the detainees had no external contacts for the first few weeks after the terrorist attacks until the BOP received more information on the September 11 detainees being held in BOP facilities.

Fifteen of the September 11 detainees we interviewed who were placed in the MDC between September 14 and October 16, 2001, told the OIG that this "communications blackout" continued until mid-October 2001.[89] The detainees said that during this period, MDC staff did not permit them visitors, legal or social telephone calls, or mail.

The BOP, in comments submitted to the OIG after reviewing the draft of this report, stated that "at no time did the [BOP] prohibit detainees from sending outgoing mail" that would have informed detainee attorneys and family members where they were being held. Our interviews with MDC staff and September 11 detainees and BOP documents contradict this assertion. For example, a conference call between the Eastern Regional Director on September 20, 2001, and various wardens (including MDC Warden Zenk) re-established legal visits, legal telephone calls, and legal mail for the September 11 detainees. However, detainees continued to be denied social visits, non-legal telephone calls, and non-legal mail until approximately mid-October 2001.

By the same token, the detainees' recollections that the communications blackout lasted until mid-October 2001 conflicted with MDC records showing detainees meeting with some consular officials and attorneys in early October 2001. On October 1, 2001, Cooksey issued procedures to all BOP facilities housing September 11 detainees that should have ended the communications

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[89] Because the September 11 detainees did not have calendars or clocks in their ADMAX SHU cells, during their interviews with the OIG most of the detainees estimated dates when specific events occurred.

blackout that had been imposed on the detainees.[90] This memorandum permitted "legal mail, legal calls, and legal visits for September 11 detainees in accordance with written Bureau (BOP) policy." Yet, even though this communications blackout was supposed to be lifted by Cooksey's October 1 memorandum, the way the BOP classified September 11 detainees created significant restrictions on access to detainees, which we describe below.

## III. Impact Of Detainee Classification

### A. Detainees' Classification

The BOP initially classified all September 11 detainees it housed as Witness Security, or WITSEC, inmates.[91] Witness Security inmates generally are individuals who agree to cooperate with law enforcement, judicial, or correctional authorities by providing evidence against persons or groups involved in illegal activities. Because their cooperation with the Government can place their lives in jeopardy, the BOP takes significant precautions

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[90] "Guidance for Handling of Terrorist Inmates and Recent Detainees," October 1, 2001, memorandum from Michael B. Cooksey, Assistant Director, Correctional Programs Division, BOP.

[91] See September 21, 2001, memorandum from Cooksey to BOP Regional Directors and Wardens categorizing September 11 detainees as "General Population WITSEC" in the BOP's SENTRY system. SENTRY is the BOP's database for monitoring the movement and management of all BOP inmates. BOP management was uncertain about the potential security risks posed to BOP staff and to other BOP inmates by the September 11 detainees. They believed that they needed to provide a greater measure of security for the September 11 detainees. The WITSEC categorization, with its accompanying additional security provisions, provided BOP management with a quick, "off-the-shelf" methodology to address their security concerns.

to ensure the safety of WITSEC inmates. Accordingly, any information about WITSEC inmates is closely guarded, such as their identity, location, and status.

Normally, the arresting agency would inform the BOP of the person's status and the need for WITSEC protection, but the BOP classified the detainees in this category without any individual assessment of the circumstances of their arrests.

When applied to the September 11 detainees, the WITSEC classification resulted in MDC officials withholding information about the detainees' status and location. This made it very difficult for attorneys, family members, and, at times, law enforcement officers to visit September 11 detainees or even determine their location. For example, because information on WITSEC inmates is so strictly protected, staff who worked at the MDC's reception desk did not know specific detainees were confined at the MDC and often told people inquiring about a September 11 detainee that the detainee was not being held at MDC when, in fact, he was. The MDC reception staff instead would refer the caller or visitor to the BOP's National Locator systems for information about the detainee.[92] Yet, because WITSEC inmates are not listed in

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[92] Members of the public have access to at least two resources to obtain information about inmates—including September 11 detainees—in the BOP's custody. The first resource, the Inmate Locator on the BOP's website (www.bop.gov), allows people to search the BOP database using a variety of criteria, including the inmate's name and BOP or INS number. When a match is made, the Inmate Locator provides the following information: the inmate's name; BOP Register Number; age; race; sex; projected release date; date released; and the name of the BOP facility holding the inmate. The information, which comes from the BOP's main inmate database, is updated daily with data on both sentenced and pre-trial inmates.

the BOP's National Locator systems, people who accessed the registry to inquire about September 11 detainees were unable to obtain any information about where a particular detainee was being held.

The OIG interviewed four attorneys who each represented a September 11 detainee housed at the MDC about their initial efforts to contact their clients. Three of the attorneys told us that they were informed by MDC front desk staff at some point that their clients were not present at the MDC when, in fact, their clients were being held in the facility at the time. One attorney told us that when she went to the MDC to attempt to locate her client, MDC staff checked their "system" and informed her that her client was not housed at MDC. After she complained, another MDC employee came to the front desk, informed the attorney that her client was in the MDC, and authorized her to meet with him.

Another attorney told the OIG that he went to the MDC after front desk staff had informed his paralegal that his client was not housed at the facility. The attorney said he provided the MDC front desk staff with numerous combinations of his client's name, which contained five different parts. The attorney said he again was told that his client was not housed at the MDC. The attorney also visited the INS's Varick Street Service Processing Center in Manhattan in a failed effort to lo-

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The second public resource, the BOP Telephone Inmate Locator, provides callers with information on federal inmates. To obtain inmate information, the caller must have any one of the following criteria to provide to a BOP operator: BOP Register Number; U.S. Marshals Service Number, FBI Number, DCDC Number, or INS Number; or the inmate's first and last names and age.

cate his client. In fact, his client was in the MDC at the time.

In addition to lifting the initial communications blackout for September 11 detainees, Cooksey's October 1, 2001, memorandum established a new inmate classification that was used for the September 11 detainees—Management Interest Group 155 (Group 155)—in part to address the lack of information the BOP was providing to attorneys and family members about the detainees. However, Cooksey's October 1 memorandum directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be "reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities."[93] As a result, the BOP continued to use "WITSEC" as its primary designation for September 11 detainees and "Group 155" as a secondary designation. Therefore, the tighter restrictions that flowed from the WITSEC designation continued to apply to all September 11 detainees, and difficulties that families and attorneys had trying to locate the September 11 detainees continued.

Four senior managers at BOP Headquarters, including Senior Deputy Assistant Director John Vanyur, acknowledged to us that the BOP's initial designation of September 11 detainees as WITSEC inmates caused

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[93] According to Cooksey's October 1 memorandum, all detainees who entered the MDC "on or after September 11, 2001" and "may have some connection to or knowledge of" the events of that day or terrorism activities, were to be housed "in the Special Housing Unit [SHU]" in the "tightest" allowable conditions until cleared by the FBI.

administrative confusion. The MDC Warden's Executive Assistant told the OIG that briefings for MDC staff in the weeks after the terrorist attacks did not provide clear guidance about how to handle inquiries from the public about September 11 detainees, particularly to staff assigned to the visitors' desk in the MDC's front lobby. MDC Warden Michael Zenk and the MDC Associate Warden for Programs both confirmed that staff at MDC's front desk had turned away visitors—including attorneys—who sought to contact September 11 detainees because of confusion surrounding the WITSEC/Group 155 designation initially assigned to the September 11 detainees.[94]

The WITSEC designation also impeded law enforcement interviews of September 11 detainees. MDC staff told the OIG that several law enforcement officials in the New York area who called the MDC to schedule detainee interviews shortly after the terrorist attacks were told that a particular detainee was not housed at the MDC. To address this problem, MDC staff established a process under which law enforcement officers contacted staff in the MDC Command Center or one of the Lieutenants responsible for supervising the ADMAX SHU in advance of their arrival to schedule an interview and to ensure that the September 11 detainee was housed at the MDC.

In response to the continuing confusion about access to the detainees and obtaining information about the detainees, the BOP established another new classification for September 11 detainees. In an October 31, 2001, memorandum, Cooksey removed the WITSEC designa-

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[94] Dennis Hasty was the MDC Warden at the time of the September 11 attacks and was replaced by Zenk in April 2002.

tion for September 11 detainees in SENTRY, the BOP's inmate tracking database, but the Group 155 assignment continued to apply to the detainees. After October 31, when MDC staff at the front reception area searched for a September 11 detainee in SENTRY, a warning message referred to the detainee as a "SPECIAL SIS CASE." The staff was therefore alerted to contact the MDC's Special Investigative Supervisor (SIS), who determined whether the visitor had been cleared to meet with the detainee.

However, problems persisted even after this second re-classification because of the BOP's initial decision to classify September 11 detainees as WITSEC inmates. As late as March 1, 2002, the Captain of the ADMAX SHU e-mailed the MDC Warden and officials at BOP Headquarters requesting that September 11 detainees no longer be categorized as WITSEC inmates in the SENTRY system.[95] According to the Captain, the WITSEC designation was unnecessary and caused "confusion . . . at times attorneys are being turned away."

**B. MDC's Special Housing Unit (SHU)**

Because of the policy that all September 11 detainees were to be held in the most restrictive conditions at BOP facilities, they were placed in the MDC's Special Housing Units (SHU). In BOP institutions, SHUs are designed to segregate inmates who have committed disciplinary infractions or who require administrative separation from

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[95] The Captain is the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU. The Captain reports to the Associate Warden for Custody, who reports to the MDC Warden.

the rest of the facility's population.[96] According to BOP regulations, an employee called the Segregation Review Official is required to review the status of each inmate housed in the SHU on a weekly basis after the inmate has spent seven days in disciplinary segregation or administrative detention. In addition, that official is required to conduct a formal hearing every 30 days to assess the inmate's status.[97]

We found that the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings monthly to assess the detainee's status. Rather, it relied on the FBI's assessment of "high interest." We reviewed the monthly SHU reports for the September 11 detainees we interviewed and found that each was annotated with the phrase "continue high security." MDC officials told the OIG that, if they did not receive notification from BOP Headquarters that the FBI had cleared a September 11 detainee, the detainee's monthly report was automatically annotated with the phrase "continue high security," without a hearing being conducted, and the detainee remained in segregation.

In addition, the September 11 detainees were housed in the most restrictive type of SHU—an Administrative Maximum (ADMAX) SHU. According to BOP officials, ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal SHU

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[96] BOP Program Statement 5270.07, Discipline and Special Housing Units.

[97] The 30-day review is documented on the BOP Special Housing Review form.

are usually sufficient for correcting inmate misbehavior and addressing security concerns. An ADMAX SHU has more restrictive conditions than a normal SHU. For example, the ADMAX SHU at the MDC, unlike a regular SHU, has a four-man hold restraint policy, handheld cameras recording detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.[98]

Conditions in the ADMAX SHU differ markedly from conditions in the MDC's general population. In the general population, inmates are allowed to move around the unit and use the unit's telephones. They also are not subjected to the movement and restraint policies enforced in the ADMAX SHU. In addition, detainees in the general population are permitted certain electronic equipment in their cells, such as small radios.

By contrast, as we describe below, detainees in the ADMAX SHU are restricted to their cells, have limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff. Several September 11 detainees who spent time in the ADMAX SHU before being moved to the MDC's general population described the difference as "between night and day."

Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU. After the September 11 terrorist attacks, MDC staff contacted staff from the BOP's Metropolitan Correctional Center (MCC) in Manhattan for

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[98] The structure and policies of the MDC's ADMAX SHU are discussed in more detail later in this chapter.

assistance in establishing an ADMAX SHU.[99] The MDC quickly created an ADMAX SHU from one part of its existing SHU. This ADMAX SHU was only partially operational when the first September 11 detainees arrived on September 14, 2001. According to MDC officials, the unit became fully operational by October 15, 2001, when MDC management distributed operating procedures to staff assigned to the ADMAX SHU.

Each wing has 31 cells and a capacity of 60 inmates per wing. The wings are divided into two blocks of cells called "ranges." September 11 detainees were housed in individual cells in the SHU range that was converted to an ADMAX SHU. As more detainees were transferred to the MDC, two and at times three detainees were housed in a single cell in the ADMAX SHU. MDC staff told the OIG that as many as 60 detainees were housed in the ADMAX SHU at one time.

In an effort to improve security, the MDC also initiated a series of structural changes to the ADMAX SHU in early October 2001 that were completed in mid-November 2001. The changes included:

- Heavy iron grillwork was installed between the SHU area housing September 11 detainees and the area housing inmates in other SHU ranges;
- Two stationary security cameras were installed in each ADMAX cell, each mounted on the wall at ceiling height. The MDC previously had installed cameras for viewing the range hallway

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[99] The MCC in Manhattan had created an ADMAX SHU after one of its correctional officers was seriously injured by a terrorist housed in the MCC's regular SHU who had been convicted of involvement in the 1998 embassy bombings in Kenya and Tanzania.

in front of the SHU cells. Monitors for viewing the cameras in the corridors and the new cameras installed in the cells were located in the officer-in-charge's room; and

- A video camera mounted on a tripod or held by an MDC staff member was used to record all movement of September 11 detainees. Video recording equipment, linked to the stationary cameras in the cells, was located in a locked room adjacent to the ADMAX SHU.

The cells in the ADMAX SHU contained a set of bunk beds, toilet and sink fixtures, a shower, and a small seating area.

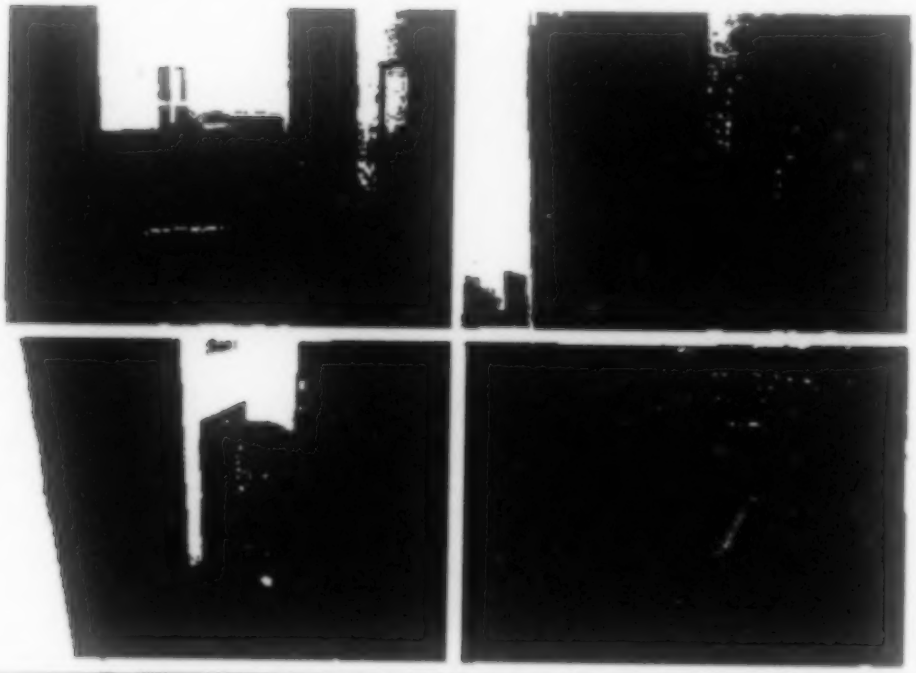

Image 1: These pictures depict a typical ADMAX SHU cell and show (moving clockwise from top left) the bunk bed, shower, seating area, and combination toilet and sink fixture. *Photographs dated May 1, 2002.*

Detainees and MDC staff used a multipurpose room located at the end of the ADMAX SHU range for medical

examinations, strip searches, recreation, and individual meetings.

Image 2: This picture shows a multipurpose room on the ADMAX SHU range that is equipped for detainee medical examinations. Photograph dated May 1, 2002.

A modified food preparation area was located between the ADMAX range and the regular SHU ranges on the MDC's ninth floor. Normally, inmate food at the MDC is served on hard plastic trays, but food for the September 11 detainees was transferred to foam plates to prevent the detainees from using plastic trays as weapons.

The recreation area in the ADMAX SHU consisted of four cell bays enclosed by chain link fencing on all sides and the ceiling. The roofs of the four recreation cells, located on the top floor of the MDC, were open to the outside. Due to security concerns, MDC staff did not provide recreation equipment to September 11 detainees housed in the ADMAX SHU.

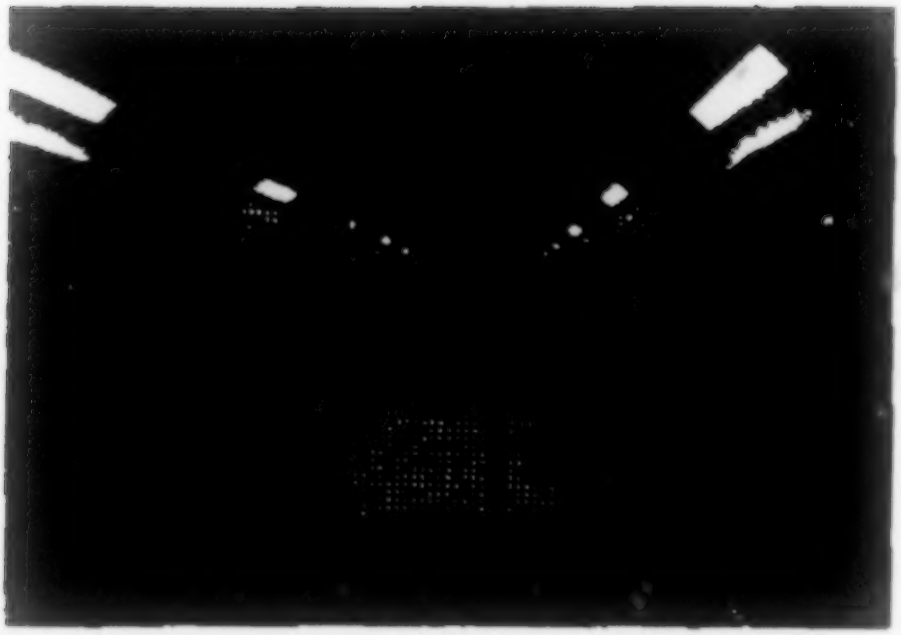

Image 3: This picture shows the ADMAX SHU recreation cells as viewed from the last recreation cell. Photograph dated May 1, 2002.

Visitors, attorneys, and family members met with September 11 detainees in a special visitation area adjacent to the ADMAX SHU range. All visits between detainees and their attorneys or family were "non-contact," meaning physical contact between parties was prevented by a clear partition. Correctional officers were not present in the special visitation areas during these visits.

Image 4: These photographs show two views of the non-contact visiting area used by September 11 detainees in the ADMAX SHU. Photographs dated May 1, 2002.

Law enforcement visitors to the ADMAX SHU were permitted contact visits with September 11 detainees in a separate visiting area across from the non-contact area.

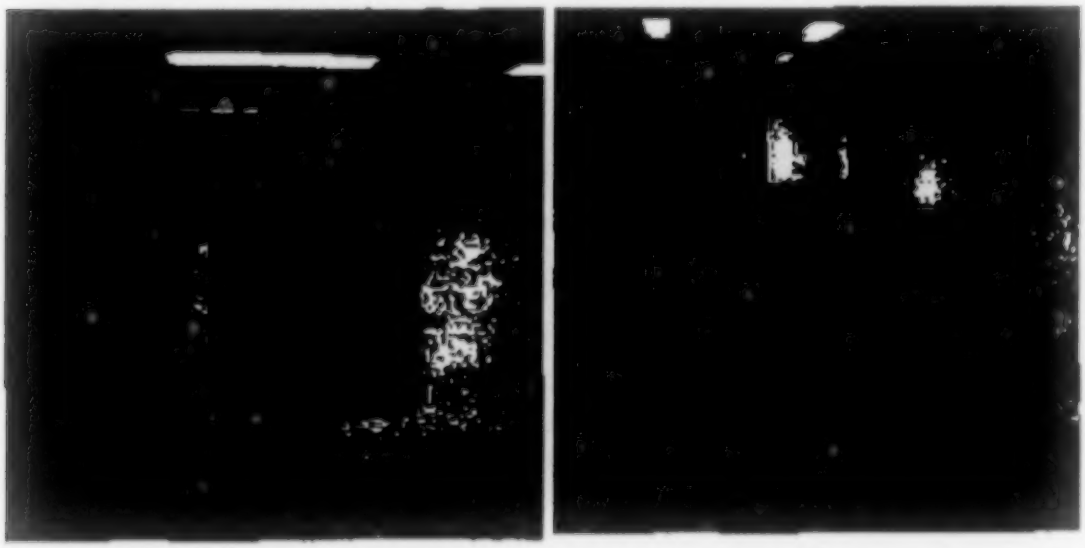

Image 5: These pictures show two views of the contact visiting area in the ADMAX SHU. Photographs dated May 1, 2002.

### C. ADMAX SHU Policies and Procedures

Officials at the MDC combined existing BOP policies for disciplinary segregation and administrative detention

to create policies and procedures governing September 11 detainees housed in the ADMAX SHU.[100] The following procedures were implemented for these detainees on September 20, 2001:

- One social telephone call a month;
- One legal telephone call a week;
- A correctional counselor was required to stand in front of the cell while detainees completed all telephone calls (according to BOP officials, this was done for security purposes and not in an effort to monitor the detainee's conversation);
- All requests to use the telephone had to be made using a "copout" form, which we describe below;
- Legal and social visits, except by law enforcement officers, were non-contact;
- Detainees remained in restraints while out of their cells. The MDC imposed three different restraint policies on the September 11 detainees:
  - Routine escort: handcuffs and leg irons;

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[100] Disciplinary segregation has more restrictive conditions than administrative detention. For example, an inmate in disciplinary segregation is entitled to one social telephone call a month, while an inmate in administrative detention is entitled to one social telephone call a week. Administrative detention is considered non-punitive and is used to house either inmates who pose a threat to themselves or facility staff, or inmates in protective custody. According to BOP Program Statements, administrative detention is designed for short periods of time unless the inmate requires long-term protection or presents "exceptional circumstances, ordinarily tied to security or complex investigative concerns."

- When required to sign forms, be interviewed, or for visitation: handcuffs, leg irons, and "Martin Chain" (approximately four feet of heavy chain that links the leg irons to the handcuffs);
- When escorted from the institution: handcuffs, handcuff cover with padlock, Martin Chain, and leg irons.

- Three staff members and one Lieutenant were present each time a detainee was placed into restraints and escorted from a cell. During this "four-man hold," one of the staff members was required to operate the portable video camera; and
- Detainees remained in restraints during non-contact visits with attorneys or family members.

**D. Detainee Complaint Process**

September 11 detainees had two methods to make a request or file a complaint about their treatment or conditions at the MDC—the "copout" and the Administrative Remedy Program. The copout, a process in which detainees identify concerns to MDC staff, was the primary method for detainees to request telephone calls (social and legal), medical care, or resolution of visitation problems.[101] The copout, while not an official complaint process, was used by detainees to request staff assistance for a variety of issues.

In contrast, the Administrative Remedy Program is the BOP's formal process for filing a complaint, such as

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[101] BOP Program Statement 5511.07, Inmate Request to Staff.

an allegation of physical or verbal abuse against facility staff. Detainees (or inmates) are expected to exhaust all informal methods for resolving their concerns, such as submitting copouts, before filing complaints under the Administrative Remedy Program.[102]

## IV. Housing Assignment Of September 11 Detainees

### A. Assignment of September 11 Detainees to the ADMAX SHU

As described above, the MDC did not follow the BOP's inmate security risk assessment procedures for determining where to house the September 11 detainees. Instead, MDC officials relied on the FBI's assessment that the detainees generally were "of high interest" to its ongoing terrorism investigation and automatically placed them in the MDC's most restrictive housing conditions—the ADMAX SHU.

The first September 11 detainees arrived at the MDC on September 14, 2001. Initially, Dennis Hasty, the MDC Warden at the time, and the former Associate Warden for Custody told us they were under the impression that the MDC would be asked to house only about 16 September 11 detainees, the capacity of one block of SHU cells if each detainee was housed individually.[103] However, the number of September 11 detainees sent to the MDC soon exceeded their original expectations as

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[102] BOP Program Statement 1330.13, Administrative Remedy Program.

[103] A 17th cell along the block was used for isolation purposes (*e.g.*, an inmate on suicide watch). This isolation cell had bars traversing the front of the cell so that correctional staff could view the occupant at all times. Each of the other 16 SHU cells had a solid door with a small window.

the FBI arrested additional aliens and classified them "of high interest." At the time, the MDC was the only detention facility in New York City operational and suitable for housing detainees under highly restrictive conditions.[104]

Officials from the BOP's Northeast Region and BOP Headquarters told MDC staff that they believed that September 11 detainees who were sent to the MDC were "suspected terrorists." However, as discussed previously, from our interviews and document reviews we determined that the FBI did not have a formal process for making an initial assessment of a detainee's possible links to terrorism, and this assessment lacked specific criteria and was applied inconsistently. The BOP's Northeast Region Counsel explained to the OIG that the BOP accepted this assessment, since the BOP normally takes "at face value" FBI determinations that detainees had a potential nexus to terrorism and therefore were "high-risk."

Under standard BOP practice, newly arrived inmates are kept separate from an institution's general inmate population for the first 30 days while staff conducts risk assessments to determine whether the inmates can be released safely into the general population. We found no evidence that MDC staff performed any of the normal risk assessments on the September 11 detainees, because the detainees were assigned automatically to the ADMAX SHU.

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[104] The MCC in Manhattan had an ADMAX SHU. However, because of security and logistical concerns associated with its proximity to the World Trade Center, the MCC did not accept new inmates during the weeks after the attacks.

### B. Reassigning September 11 Detainees to the General Population

We found that even after September 11 detainees who had been placed in the ADMAX SHU were finally "cleared" by the FBI, some remained in the ADMAX SHU for days or weeks after they were supposed to be transferred to the MDC's less restrictive general population.

#### 1. Centralizing the Notification Process

As discussed in Chapter 4, prior to October 1, 2001, the FBI New York Field Office and the INS New York District Office developed their own procedures to clear local September 11 detainees using staff who served on the New York Joint Terrorism Task Force (JTTF). When the FBI liaison to the New York JTTF told the INS and BOP liaisons that the FBI had no further investigative interest in a particular detainee, the BOP liaison drafted a clearance memorandum to the MDC Warden or Captain. When the Warden received this memorandum, the detainee could be "normalized" (*i.e.*, released to the general population).[105]

However, this process did not occur quickly, even after the FBI cleared the detainee. According to the OIG's data analysis, before October 2001, the MDC received notification that the FBI had cleared a September 11 detainee an average of 15 days after the FBI's New York Field Office had actually cleared the detainee.

On October 1, 2001, the process for transferring the detainees from the ADMAX SHU to the general population was centralized to BOP Headquarters in Washing-

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[105] A copy of such a memorandum is attached as Appendix J.

ton, D.C. Under the new process, the FBI's New York Field Office informed FBI Headquarters that a detainee was no longer of investigative interest to its terrorism investigation. Subsequently, staff in the International Terrorism Operations Section at FBI Headquarters coordinated CIA checks for detainees before issuing clearance memoranda.

The BOP employee who served as a liaison to FBI Headquarters during this period told the OIG that he generally checked with the FBI on a daily basis for new clearance memoranda for September 11 detainees.[106] The liaison said that once a clearance memorandum was issued, he notified the Intelligence Section at BOP Headquarters, either by e-mail or in his weekly report, that the FBI had cleared a specific September 11 detainee. Staff in BOP's Intelligence Section then prepared a memorandum from Cooksey, the BOP's Assistant Director for Correctional Programs, to the Warden of the BOP institution in which the detainee was held. The "Cooksey memorandum," as it became known, formally notified a BOP Warden that a detainee was no longer considered "high risk" and that his conditions of confinement could be normalized.

After the FBI and BOP implemented this centralized process, the time it took for a BOP facility to receive notice that an inmate was no longer considered "high risk" lengthened. Our analysis found that the MDC received notice from BOP Headquarters, via a Cooksey memo-

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[106] The BOP liaison stated that he checked with the FBI daily until the end of April 2002, by which time the number of September 11 detainees held in BOP facilities was drastically reduced. The liaison said that starting in May 2002 he monitored the issuance of FBI clearance memoranda once or twice weekly.

randum, an average of 32 days after the FBI New York Field Office had cleared a September 11 detainee. The range of these cases varied from a minimum of 7 days after the FBI New York Field Office's clearance for one detainee to 109 days for another detainee.

BOP officials told us that they would not transfer a September 11 detainee to an institution's general population prior to receiving the FBI clearance notification via the Cooksey memorandum. We found inconsistencies in this policy, which we discuss in the next section. Moreover, BOP officials explained that the process to transfer an inmate to the general population after receiving clearance could take several days. The Cooksey memorandum permitted the MDC to assess detainees using normal BOP policies to place them in appropriate housing. After receiving a memorandum on a particular detainee, the MDC conducted its own assessment of the detainee, and BOP officials said it took time to review records and interview correctional officers as part of this assessment. BOP officials told us that they were aware of two detainees who unintentionally were left in the ADMAX SHU after the MDC received the Cooksey memorandum, due to administrative errors. They also stated that they were aware of a third detainee who received a Cooksey memorandum but remained in the ADMAX SHU because of disciplinary problems.

The efficiency of the FBI clearance process and the length of time it took BOP Headquarters to notify the MDC of a detainee's clearance were significant because they dictated when a September 11 detainee could be released to the MDC's general population, where detention conditions were markedly less restrictive.

### 2. Inconsistencies in Detainee Reassignment Procedures

We also found that the MDC inconsistently applied the Cooksey memorandum process for transferring September 11 detainees from the ADMAX SHU to the general population. Of the 53 detainees in our MDC sample, 23 received Cooksey memoranda; 20 never received Cooksey memoranda; and 10 were cleared using the local procedures in effect prior to centralization of the process at FBI and BOP Headquarters on October 1, 2001. Of the 20 detainees who never received Cooksey memoranda, 14 were transferred from the MDC,[107] 5 were released into the general population without FBI clearances,[108] and 1 was released on bond.

Our analysis of the 23 detainees in our MDC sample who received Cooksey memoranda determined that FBI Headquarters took an average of 107 days to clear the detainees of any connection to terrorism, and the MDC received this notification an average of 24 days after the detainee was actually cleared by FBI Headquarters.[109]

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[107] Detainees removed from the institution were returned to INS custody, transferred to another BOP institution, or removed from the United States. One detainee in our sample was released on bond.

[108] We asked MDC management for an explanation for why detainees were released into the general population without FBI clearances. They were unable to provide an explanation.

[109] The time it took the MDC to release the inmate into the general population, after the FBI clearance was received, ranged from 5 to 119 days in our sample. In the 119-day case, the detainee had entered the MDC on October 4, 2001, and was cleared by the FBI on December 19, 2001. However, he was not released to the MDC's general population until April 17, 2002. According to Warden Zenk, the detainee's continued confinement in the ADMAX SHU for 119 days after he was cleared by the FBI "was due to an administrative

In response to OIG questions, BOP management offered no explanation for why it took, on average, more than one month to issue Cooksey memoranda after the FBI had cleared the September 11 detainees.

Our analysis of the records of the 23 detainees who received a Cooksey memorandum showed that 4 of the 23 detainees were released into the general population prior to a Cooksey memorandum being received. Further, three of these four detainees did not have FBI clearances prior to being released into the general population. While it is possible that the MDC could have learned that a detainee had been cleared by the FBI from a source other than a Cooksey memorandum, such deviation from the standard procedure is noteworthy given the BOP's adherence to other rules developed to ensure that the September 11 detainees did not present a risk to the facility's staff or other inmates.

**Case Study 1:**

A September 11 detainee arrested in New York City arrived at the MDC on November 5, 2001. More than six months later, on May 16, 2002, the FBI officially determined that the detainee was of "no investigative interest" regarding the September 11 attacks or terrorism in general. However, a BOP Intelligence Liaison in the SIOC at FBI Headquarters wrote that "due to an internal FBI admin[istrative] error," notification from the FBI to the BOP that the detainee had been cleared was not received by the BOP until June 13, 2002.

The Cooksey memorandum for this detainee issued by

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error" on MDC's part and was uncovered after BOP Headquarters performed an audit of September 11 detainees.

BOP Headquarters arrived at the MDC on June 14, 2002. The detainee was released into the MDC's general population later that same day, more than seven months after his arrest and almost one month after the FBI had cleared him.

## V. Access To Legal Counsel

This section examines the access to counsel afforded September 11 detainees while housed in the MDC. We focus on the policies and procedures implemented by the MDC that affected these detainees' access to counsel. We also examine how the MDC's initial communications blackout and the detainees' WITSEC classification affected the availability of legal calls, access to pro bono attorney lists, and the ability of their attorneys to meet with them.

### A. Legal Telephone Calls

We found that the BOP's decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel.

Under applicable BOP policies, MDC officials had significant discretion to determine the frequency and length of the detainees' legal telephone calls. Yet, we found that the MDC adopted procedures for September 11 detainees more appropriate for pre-trial inmates who had obtained counsel prior to their detention, rather than for individuals like the September 11 detainees, the vast ma-

jority of whom had no legal representation upon arriving at the MDC and needed to secure counsel.[110]

The BOP's national policy on attorney telephone calls states that inmates should be afforded the opportunity "to place an occasional unmonitored call to his or her attorney . . . frequent calls should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate." BOP regulations do not specify an acceptable number of inmate legal telephone calls, nor does the policy define what level of attorney communication is "not adequate."[111] MDC officials told us that in accordance with BOP Headquarters's instructions to maintain the tightest restrictions possible on the September 11 detainees, they decided to adopt a practice of permitting detainees one legal telephone call per week. The MDC's legal call practice did not violate any BOP policy because, given the absence of existing written guidance from BOP Headquarters, MDC management was given broad discretion to develop and implement a facility-specific legal call policy for the detainees.

MDC unit managers and counselors controlled the process for placing legal telephone calls for detainees housed in the ADMAX SHU. Detainees who wanted to make a legal call had to submit a written request known

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[110] For example, the BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Neither BOP Headquarters nor the MDC developed new policies addressing the unique needs of September 11 detainees regarding telephone access to allow them to obtain attorneys or place legal calls.

[111] An exception in the written policy is when the inmate or the inmate's attorney demonstrates an imminent court deadline.

as a "copout." A unit counselor described the process for placing legal telephone calls in the ADMAX SHU once a September 11 detainee submitted a copout:

- The counselor or unit manager plugged a telephone into an unmonitored line outside of the detainee's ADMAX SHU cell;
- The detainee provided the MDC employee with a telephone number, which the counselor or unit manager dialed and verified that the unmonitored call was placed to the detainee's attorney;
- The counselor passed the telephone to the detainee through the horizontal slot in the cell door; and
- The counselor remained at the cell door until the detainee completed his call.

In addition to the written copout process, our interview with the ADMAX SHU unit counselor and our review of the MDC Legal Call Log revealed that the unit counselor made rounds to offer legal calls to September 11 detainees, at the most, 2 to 3 times per week. In fact, our review of the Legal Call Log and copout records revealed that between September 17, 2001, and April 3, 2002, there were six periods of over seven days in which the counselor did not make rounds in the ADMAX SHU to offer detainees the opportunity to place legal calls. Three of these periods were between September 17, 2001, and January 2, 2002, and lasted 28, 16, and 8 days. The other three periods were between January 8 and April 3, 2002, and lasted 20, 16, and 8 days.

Three September 11 detainees interviewed by the OIG said that each time the unit counselor made rounds through the ADMAX SHU he simply asked detainees

"are you okay?" The three detainees said that, initially at least, they did not realize that this question was shorthand for, "Do you want a weekly legal telephone call?" A unit counselor confirmed to the OIG that when he made rounds through the ADMAX SHU to provide legal calls, he asked the September 11 detainees, "Are you okay?" to determine whether they wanted to make legal calls. Detainees we interviewed reported that an affirmative response to the question of whether they were "okay" resulted in them not receiving a legal telephone call that week.

The Associate Warden for Programs, the ADMAX SHU unit manager, and a unit counselor told us that if a detainee declined an opportunity to make a legal call, this refusal was not always recorded in the MDC's Legal Call Log. Our analysis also found that legal call refusals were not consistently annotated in the log. The Associate Warden said that the unit counselor prepared a weekly memorandum that listed the names of the detainees who refused legal calls that week.

We analyzed the weekly legal call memoranda, the Legal Call Log, and copouts for legal calls submitted by the 19 September 11 detainees we interviewed at the MDC. The first legal call made by any September 11 detainee, according to these three sources, was not until October 15, 2001.[112] Yet, the MDC was notified via confer-

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[112] In order to assess the placement of legal calls by September 11 detainees, we requested the telephone records for the unmonitored telephone lines used by the detainees in the ADMAX SHU. The telephone company stated that it could not isolate telephone line extensions within the MDC. Additionally, MDC Warden Zenk informed us that the MDC telephone system did not have the capacity to retrieve the detainees' telephone records that we requested. There-

ence call by the BOP Northeast Region that legal telephone calls could be made by detainees as of September 20, 2001.

Based on the length of time spent in the ADMAX SHU, the 19 detainees we interviewed collectively should have been offered 383 opportunities to make legal phone calls. The Legal Call Log lists 200 legal calls made by these detainees.[113] We also reviewed 60 memoranda with the names of detainees who declined their legal calls and 27 copouts for which there are no corresponding entries in the log. We concluded that, at best, detainees in our sample were offered 287 legal telephone calls, far less than one legal call per detainee per week.

The detainees we interviewed also stated they were not always offered weekly legal calls. Seven of the 19 September 11 detainees we interviewed stated that they did not complete legal telephone calls and were not visited by attorneys from the time they arrived at the MDC in mid-October until mid- December 2001. When detainees began placing legal calls from the ADMAX SHU in mid-October 2001, 15 of the 19 detainees we interviewed told the OIG they were permitted, at most, one legal telephone call per week. Three detainees told us that they never were offered legal telephone calls, and one detainee stated that he was denied legal calls as part of disciplinary punishment. A review of the Legal Call Log indicates that this particular detainee placed one legal call during the month he spent in the ADMAX SHU.

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fore, we were not able to independently verify the information in the MDC Legal Call Log or on the legal call copouts.

[113] We obtained corresponding copouts for 123 of the legal calls.

Fourteen of the 19 detainees were not offered their first legal phone calls within 7 days of arrival at the MDC. Of this group of detainees, the earliest legal phone call was offered ten days after arrival. One detainee was not offered his first legal phone call until 42 days after arrival. The average time from arrival to the first offer to make a legal phone call for the 14 detainees was 17 days.

We found that of the 287 legal telephone calls offered, 101 (37 percent) were offered more than seven days apart. In response to this finding, the MDC unit counselor said he offered weekly legal calls and the detainees' statements to the contrary were inaccurate.

Even when MDC offered detainees telephone calls, the MDC's response to unsuccessful attempts to contact attorneys by telephone was arbitrary. Four of the 19 detainees we interviewed told the OIG that legal calls resulting in a busy signal or calls answered by voicemail counted as their one legal call for the week. In addition, six detainees told the OIG that their calls to attorneys on the pro bono attorney list that resulted in no answer, were a wrong number, or resulted in a refusal to provide legal services counted as the detainees' legal call for that week. The unit counselor disputed these claims, stating that a "no contact" or busy signal did not count against the detainee as his sole weekly legal call. The unit counselor told the OIG that if the line was busy or the call could not be placed for some other reason, he tried to provide another legal call to the detainee the next time he made rounds in the ADMAX SHU. Yet, the Legal Call Log, which lists 200 total calls for September 11 detainees, indicates at least four instances when a "no contact" or busy signal counted as a detainee's weekly legal call. Moreover, the Associate Warden for Programs, the AD-

MAX unit manager, and a second unit counselor acknowledged to the OIG that reaching an answering machine counted as a completed legal call, although encountering a busy signal did not. This meant that for some detainees, if they reached an answering machine while trying to obtain an attorney during their one weekly telephone call, they would not be permitted another legal call for a week.

Also, according to six September 11 detainees we interviewed, unit counselors unilaterally hung up the telephone when a detainee's legal call lasted longer than three minutes. The ADMAX SHU unit counselor denied this allegation and stated that he did not limit the length of detainees' legal calls. The Legal Call Log, which is supposed to track the length of detainee legal calls, shows most calls lasting at least 5 minutes, with the longest call noted as 34 minutes.

In late November 2001, at least 20 September 11 detainees at the MDC staged a hunger strike to express dissatisfaction with their confinement and the conditions in the ADMAX SHU, including the restrictive telephone policies. Four of the 19 September 11 detainees we interviewed said they refused food beginning in late November 2001 to protest a lack of attorney telephone calls, among other issues. A daily ADMAX SHU report filed on November 28, 2001, confirmed the hunger strike, and noted that 20 of the September 11 detainees were refusing to eat, in part because of concerns about limited legal telephone calls.[114]

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[114] We discuss detainee hunger strikes at the MDC in greater detail in Section VII of this chapter.

**Case Study 2:**

We interviewed a September 11 detainee at the MDC who was arrested on September 26, 2001. He said he was originally arrested after the New York JTTF executed a search warrant for his apartment. He was suspected of social security fraud, insurance fraud, and credit card fraud. He also was suspected of working with others in a scheme to provide funds to al Qaeda. He was immediately transferred to INS custody and spent approximately one day at the INS Varick Street Service Processing Center. He told us he was never informed as to why he was arrested but said he later pleaded guilty to marriage fraud.

Based on the Legal Call Log, the detainee was not offered a legal call until October 15, 2001. That call was listed as a completed 10-minute call. According to the Legal Call Log, the detainee was not offered his next legal call until November 7, 2001, which the ADMAX SHU Counselor recorded as being refused by the detainee. The log showed that on December 17, 2001, the detainee made his next legal call, the result of which was an incomplete "no answer." This detainee refused three legal call offers in January 2002, according to weekly memoranda that recorded the detainees who did not wish to make a legal call.

The detainee told us that he was given a pro bono attorney list by MDC staff in October 2001. He stated that he tried to contact several legal services providers on the list, but received no responses when he called the numbers listed. He denied being offered the opportunity to make a legal phone call in November 2001. The detainee also stated that he was not allowed to make a social call to his sister for the first three months he was incarcerated at the MDC. He said that

in December 2001, he finally contacted his sister and that by mid-January 2002, his sister had obtained legal representation for him, approximately four months after he entered the MDC.

### B. Attorney Visits

The BOP's classification of September 11 detainees as WITSEC inmates also hampered their ability to visit with attorneys long after the MDC lifted its initial communications blackout. Even though MDC officials developed procedures to permit meetings between detainees and their attorneys in the ADMAX SHU, the continuing confusion on the part of MDC staff who interacted with attorneys about the location of detainees made the attorneys' ability to visit their clients more difficult.

The first attorney visit recorded for a September 11 detainee at the MDC took place on September 29, 2001. The next two attorney visits for different detainees were noted on October 10, 2001. According to the Associate Warden for Programs, the MDC did not allow September 11 detainees any visitors for about three weeks after the terrorist attacks. During this communications blackout period, MDC staff told attorneys who sought to visit September 11 detainees that information on the detainees was not available. Instead, MDC staff referred the attorneys to the BOP's National Locator Service, which, as we discussed previously, contained no information about September 11 detainees due to their WITSEC classification.

By the end of the first week in October 2001 (after the communications blackout was lifted), the MDC instituted the following new screening procedures to determine

whether attorneys could meet with September 11 detainees:

- MDC staff referred an attorney seeking to visit a September 11 detainee to the Associate Warden for Programs;
- The Associate Warden called an Assistant United States Attorney to verify the credentials of the lawyer requesting to visit a detainee in the ADMAX SHU;
- The Associate Warden contacted the attorney to verify that the attorney represented a specific detainee or wanted to meet with a certain detainee to discuss representation; and
- If the attorney met the above criteria, the Associate Warden prepared a memorandum approving the attorney's visit, which she sent to staff stationed at the MDC's front desk. This approval for visitations by the Associate Warden also was effective for future visits by the attorney to the same detainee.

When an attorney seeking to visit a September 11 detainee arrived at the MDC and provided the name of his or her client, the desk officer checked two lists which were updated daily: a general, sanitized roster of all MDC inmates that did not include WITSEC/Group 155 inmates, and a list of "separatees"—inmates who had been separated from the general population for a variety of reasons. However, the Associate Warden for Programs, the MDC Captain, and MDC reception area staff told the OIG that the September 11 detainees were not on either list. Instead, their names were kept on a third list maintained elsewhere in the MDC in order to control access to the information. This list was not kept at the

MDC reception area. Therefore, if an attorney asked about a detainee whose name was not on either of the two daily lists available to the officer at the front desk, and the attorney had not obtained prior approval for visits from the Associate Warden, the desk officer told the attorney that the detainee was not present at the facility (when, in fact, the detainee may have been incarcerated in the ADMAX SHU).

Five New York-area attorneys told us that they were unable to meet with their September 11 detainee clients for many weeks because MDC staff told them that their clients were not housed at the MDC. Four of the attorneys each represented one detainee and one attorney represented several MDC detainees. According to the attorneys, they were not permitted to visit their clients during the second week of November 2001, and the first weeks of December 2001, February 2002, and March 2002. The attorneys said they were turned away either over the telephone or when they showed up at the MDC. According to the attorneys, no MDC officials mentioned any clearance procedure they needed to follow in order to visit their clients.

Eventually, these attorneys did gain access to their clients, and by the time of our May 2002 site visit to the MDC, all of the attorneys we interviewed said they were not having problems obtaining access to their clients at the MDC.

### C. Pro Bono Attorney List

As noted above, most of the September 11 detainees had not hired attorneys before entering the MDC and, consequently, needed to solicit legal representation when initially incarcerated in the MDC. For example, 17 of the 19 September 11 detainees we interviewed said they did not have attorneys when they arrived at the MDC. The

remaining two detainees had retained attorneys during their stays at other detention facilities before they were transferred to the MDC.

We found that the INS did not consistently provide September 11 detainees with lists of attorneys who would take immigration clients without compensation (known as "pro bono" cases). Several of the detainees we interviewed said that they did not receive the pro bono lists until days or months after their arrival at the MDC.[115] We also found that the lists they eventually received contained significant inaccuracies, including wrong telephone numbers and numbers for attorneys who were unwilling or unable to take the September 11 detainees as clients because they only handled immigration asylum claims.

As stated previously, the BOP classified the September 11 detainees as pre-trial inmates. The BOP has no policy that requires its staff to provide lists of pro bono attorneys to pre-trial inmates arrested by the INS. On the other hand, federal regulations specify that INS officers who processed the September 11 detainees after they were arrested were responsible for providing the detainees "with a list of the available free legal services . . . located in the [INS] district."[116] The Executive Office

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[115] Eleven of the 19 September 11 detainees we interviewed said they received pro bono attorney lists from ADMAX SHU counselors within the first month of entering the MDC. However, four detainees stated that they did not receive the list for more than a month, and one detainee stated that he never received a pro bono attorney list. Two September 11 detainees we interviewed were unsure when they received the list, and one detainee's attorney advised him not to respond to our question.

[116] 8 C.F.R. § 287.3(c).

for Immigration Review (EOIR), part of the Department of Justice, maintains lists of pro bono attorneys who offer free legal services to immigration detainees in each INS District and distributes these lists to detention facilities holding immigration detainees.

In addition, Immigration Judges overseeing removal proceedings for the September 11 detainees also are required to, "[a]dvise [detainees] of the availability of free legal services . . . located in the [INS] district."[117] The INS requires that staff members at all of its detention facilities, including contract facilities, enable detainees to make calls to attorneys on the INS-provided pro bono list.

According to the MDC's Associate Warden for Programs and the ADMAX SHU Captain, when the BOP lifted its restriction on telephone calls for September 11 detainees on October 1, 2001, MDC staff obtained a list of pro bono attorneys from the INS within a week and provided that list to detainees. However, the MDC staff we interviewed, including the Associate Warden, stated that the list contained inaccurate telephone numbers.

As described above, some detainees told us that their calls to attorneys on the pro bono list that resulted in no answer, were clearly an inaccurate number, or resulted in a refusal to provide legal services counted as the detainees' legal calls for that week. Consequently, the inaccurate pro bono attorney list affected detainees' ability to contact counsel in a timely manner. The Associate Warden and the ADMAX SHU Captain told the OIG that they obtained more accurate pro bono lists from EOIR

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[117] 8 C.F.R. § 240.10(a)(2).

and the INS between mid-October and early November 2001.

**D. Social Visits**

We found that BOP's classification of September 11 detainees as WITSEC/Group 155 inmates, and the resulting confusion this designation caused MDC staff, prevented or delayed many of the detainees' visits from family members.

In order to schedule a social (as opposed to an attorney) visit, September 11 detainees had to provide a list to MDC staff of which family members they wanted to be able to visit them. The same problems that attorneys encountered in attempting to visit their clients at the MDC hindered the detainees' family visits as well. Three detainees we interviewed said family members on their lists were told by MDC staff that the detainees were not housed at the MDC when, in fact, the detainees were in the facility.

As discussed previously, the BOP made changes in the detainees' classification status at the end of October 2001 after realizing that its original WITSEC/Group 155 designations were causing problems for MDC staff in handling requests for visits from detainees' attorneys and family members. The BOP also added notations in its SENTRY inmate tracking system whenever a September 11 detainee's name was queried before staff authorized a visit. The messages were designed to alert MDC staff about information that could and could not be released about these detainees (*e.g.*, "Special SIS case—do not disclose location—notify SIS of inquiry"). We found, however, that the detainees' redesignation in the BOP system did not mean that MDC staff provided better assistance to detainees' visitors. The MDC's Associate Warden for Programs told the OIG that MDC manage-

ment sought to address the social visitation problem by training reception area staff on proper procedures for granting visitation to detainee family members. However, problems persisted, as illustrated by the following case study.

**Case Study 3:**

One September 11 detainee was held at the MDC from October 16, 2001, until June 14, 2002. His wife said she experienced repeated problems while attempting to visit her husband. The woman, who took unpaid leave from work to travel from her home in New Jersey to the MDC, said that between October and December 2001 she was told by staff at the MDC visitors' desk that her husband was not incarcerated at the facility when, in fact, he was. When she eventually learned her husband was at the MDC, she visited him for the first time on December 19, 2001, after being granted a "special visit" by the unit manager at a date and time outside the normal visiting schedule. From January 31 to March 31, 2002, the woman said she was not permitted to visit her husband because he was being disciplined for failing to stand up for a 4:00 p.m. daily count.

The woman subsequently was permitted to visit her husband during the week of April 2, 2002. However, she was not permitted to visit her husband the week of May 1, 2002, because she arrived at the MDC on a day and at a time that MDC reception area staff told her was not the appropriate time to visit detainees held in the ADMAX SHU. The woman told the OIG that she assumed this was an appropriate time because it was the same day of the week and hour of her previous "special visit." When she contacted the ADMAX SHU unit manager about this particular visitation problem, he arranged for another "special visit" which took

place on May 4, 2002. On May 9, 2002, the detainee's wife arrived at the MDC to visit her husband but MDC staff told her that all the visitation rooms were full. She was asked to wait until after the 4:00 p.m. inmate count for a possible visit at 4:30 p.m. At 4:30 p.m., the reception staff told her to go home and call the following day. On May 10, 2002, the detainee's wife said she was unsuccessful in contacting anyone at the MDC to arrange a visit with her husband.

As of May 10, 2002, the woman had succeeded in visiting her husband three times during his more than five months of confinement in the ADMAX SHU.

### E. Contact with Foreign Consulates

Similar to the problems experienced by attorneys seeking access to their September 11 detainee clients, the BOP's categorization of these detainees as WITSEC inmates inhibited the ability of consular officials to determine whether individuals from their countries were held at the MDC. Beyond that issue, however, we found that MDC staff did attempt to facilitate visits by foreign consulates that requested meetings with detainees from their countries.

The federal government's policy regarding consular access to incarcerated foreign nationals applies whether the detainees are in the custody of the BOP or the INS. Federal regulations state:

> Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries . . . require immediate communication with appropriate consular or diplomatic officers

> whenever nationals . . . are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf.[118]

According to Michael Rozos, Chief of the INS's Long Term Review Branch, INS agents who arrested September 11 detainees on immigration violations were required to inform the aliens that they had a right to contact consular or diplomatic officers from their country of nationality in the United States. Rozos acknowledged that if aliens express an interest in making such contacts, the INS is required to facilitate that request, usually by providing the detainee access to a telephone along with the number for the appropriate consulate.

INS regulations specifically provide that an alien detained by the INS "shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." Therefore, the INS was responsible for informing the September 11 detainees of their rights to contact their consular representatives, even for those detainees who were first held at BOP facilities like the MDC. The INS uses a form to document that it asked detained aliens if they wanted to contact their consulate.[119] Of the 44 A-Files we were able to review for the September 11 detainees in our MDC sample, only 10 detainees had copies of this form in their files.

BOP policy requires that "whenever it is determined that an inmate is a citizen of a foreign country, the War-

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[118] 8 C.F.R. § 236.1(e).

[119] INS Form I-213, "Notice to Arrested or Detained Foreign Nationals Consular Notification and Access."

den shall permit the consular representative of the country to visit on matters of legitimate business. A Warden may not deny this privilege even if the inmate is in disciplinary status."[120] MDC Warden Zenk said that the MDC's role was limited to providing detainees with consular telephone calls upon their request and to facilitate detainees' meetings with consular officials after MDC staff conducted appropriate screenings of the consular officials. He said that the MDC did not have responsibility for notifying detainees' consulates about their incarcerations.

Zenk told the OIG that the MDC was not contacted by any foreign consulates about September 11 detainees in the two weeks immediately following the September 11 attacks. Zenk and the Associate Warden for Programs said that beginning in October 2001, all inquiries from consulates to the MDC were directed to the Warden's Executive Assistant, who served as the point of contact for consular representatives seeking to visit September 11 detainees at the MDC. According to Zenk, the MDC carefully screened consular personnel before permitting them to visit with September 11 detainees. He said consulates were required to submit a written request stating the name of the detainee to be visited and the names of the visiting consular officials. When the visitors were approved, the Executive Assistant or the Associate Warden for Programs forwarded a memorandum officially approving the visits to the MDC's front desk to inform MDC staff of the impending consular visit.

However, similar to the difficulty experienced by detainees' attorneys and family members seeking to meet

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[120] BOP Program Statement 5267.06, Visiting Regulations.

with them, the MDC detainees' designation as WITSEC inmates made it difficult for consulates to contact detainees who were citizens of their countries. For example, on October 9, 2001, a consular official met with five September 11 detainees at the MDC. Later that same day, the consular official tried to call the MDC Warden to discuss the detainees' cases, but was informed by an MDC employee that none of the five detainees was held at the MDC. Instead, the MDC employee gave the consular official the telephone number for BOP's National Inmate Locator, which, as discussed previously, did not contain information about the September 11 detainees.

Our review of files maintained by the Warden's Executive Assistant shows that between October 1, 2001, and May 7, 2002, the MDC received 22 requests for visits from 9 consulates regarding 24 different detainees. In addition, the Pakistani consulate made two requests to meet all Pakistani detainees housed at the MDC. Most of the correspondence in the file is annotated to indicate that a consular visit was approved or actually occurred. The exceptions were an October 24, 2001, request to visit five detainees, and a December 6, 2001, letter requesting visits with two detainees. We were unable to determine whether these consular visits took place because the letters are not annotated and the MDC did not maintain a separate list that reflected consular visits with September 11 detainees.

The MDC was not required to affirmatively notify foreign consulates that it was detaining citizens from their countries who had been arrested in connection with the September 11 terrorism investigation. BOP policy mandated only that MDC officials "permit" visits by consular officials. The overwhelming majority of September 11 detainees were nationals of Pakistan, India, Egypt, and

Saudi Arabia. The international treaties that the United States has with these countries do not require mandatory notification of the consulate when a foreign national of those countries is held in U.S. detention.

Our review of the 22 visitation requests from consulates received by the MDC from October 2001 to early May 2002 showed that only 2 of the requests were from a country (United Kingdom) that, by treaty, requires affirmative notification. While we did not determine if the INS affirmatively notified United Kingdom consular officials of these two detentions, we found that these two detainees were visited by consular officials from the United Kingdom and the MDC complied with BOP policies in facilitating consular visits for these two detainees.

## VI. Allegations Of Physical And Verbal Abuse

Based on our interviews of 19 September 11 detainees and our investigation of allegations of abuse raised by several detainees, we believe the evidence indicates a pattern of physical and verbal abuse against some September 11 detainees held at the MDC by some correctional officers, particularly during the first months after the terrorist attacks. Although the allegations have been declined for criminal prosecution, the OIG is continuing to investigate these matters administratively.[121]

In this section of the report, we describe our interviews of 19 September 11 detainees during our inspection

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[121] The OIG can pursue a complaint either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, for a variety of reasons, may not result in prosecution. When this occurs, the OIG can continue the investigation and treat the matter as a case for potential administrative action. The standard of proof to prove allegations in an administrative case is less than the "beyond a reasonable doubt" standard in a criminal case.

visit in May 2002, the investigation conducted by the OIG's Investigations Division regarding specific complaints of abuse, and other allegations of abuse that were referred to the FBI or BOP for investigation.

**A. OIG Site Visit**

In connection with this review of the treatment of September 11 detainees, our inspection team interviewed 19 detainees who were being held at the MDC when we visited the facility in May 2002. All 19 detainees complained of some form of abuse. Twelve complained about physical abuse and 10 complained about verbal abuse. The complaints of physical abuse ranged from painfully tight handcuffs to allegations they were slammed against the wall by MDC staff. The detainees told us that the physical abuse usually occurred upon their arrival at the MDC, while being moved to and from their cells, or when the hand-held surveillance camera was turned off.

Ten of the 19 detainees we interviewed during our inspection visit alleged they had been subjected to verbal abuse by MDC staff, consisting of slurs and threats. According to detainees, the verbal abuse included taunts such as "Bin Laden Junior" or threats such as "you're going to die here," "you're never going to get out of here," and "you will be here for 20-25 years like the Cuban people." They said most of the verbal abuse occurred during intake and during movement to and from the detainees' cells.

Our inspection team interviewed 12 correctional officers about the detainees' allegations of physical abuse. All 12 officers denied witnessing or committing any acts of abuse. Further, they denied knowledge of any rumors about allegations of abuse. The correctional officers we interviewed also denied they verbally abused the detain-

ees and denied making these specific comments to the detainees.

**B. OIG Investigation of Abuse**

On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter. When we interviewed the detainee, he complained that MDC officers repeatedly slammed him against walls while twisting his arm behind his back. He also alleged officers dragged him by his handcuffed arms and frequently stepped on the chain between his ankle cuffs. The detainee stated his ankles and wrists were injured as a result of the officers' abuse. He also identified three other September 11 detainees who allegedly had been abused by MDC staff members.

We interviewed these three other September 11 detainees. They stated that when they arrived at the MDC, they were forcefully pulled out of the vehicle and slammed against walls. One detainee further alleged that his handcuffs were painfully tight around his wrists and that MDC officers repeatedly stepped on the chain between his ankle cuffs. Another detainee alleged officers dragged him by his handcuffs and twisted his wrist every time they moved him. All three detainees alleged that officers verbally abused them with racial slurs and threats like "you will feel pain" and "someone thinks you have something to do with the World Trade Center so don't expect to be treated well."

During our investigation of these complaints, we received similar allegations from other September 11 detainees. On February 11, 2002, four September 11 detainees held at the MDC (including one of the detainees

we interviewed previously) told MDC officers that certain MDC officers were physically and verbally abusing them. Those complaints were provided to us. In interviews with our investigators, these detainees alleged that when they arrived at the MDC in September and October 2001, MDC officers forcefully pulled them from the car, slammed them into walls, dragged them by their arms, stepped on the chain between their ankle cuffs, verbally abused them, and twisted their arms, hands, wrists, and fingers. One of the detainees alleged that when he was being taken to the MDC's medical department following a 4-day hunger strike, an officer bent his finger back until it touched his wrist. Another detainee alleged that when he arrived at the MDC, officers repeatedly twisted his arm, which was in a cast, and finger, which was healing from a recent operation. He also alleged that when he was transferred to another cell in December 2001, officers slammed him into a wall and twisted his wrist.[122] One detainee claimed his chin was cut

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[122] This detainee alleged that while being transferred to another cell in the MDC in December 2001, two officers threw him against his cell wall, twisted his wrist, and placed him in the cell naked and without a blanket. The detainee claimed the officers physically abused him because he refused to clean his cell prior to the transfer. He claimed the officers' abuse left a scar on his wrist. The case was referred to the BOP, which interviewed the detainee, reviewed his medical records, and had the detainee's wrist examined. The MDC medical department did not find a scar on the detainee's wrist. The BOP also interviewed two officers alleged to have committed the abuse and a supervising officer who witnessed the detainee's transfer. All three stated that during a routine cell rotation the detainee began cursing and threatening the officers. One officer filed an incident report describing what he characterized as the detainee's insolent and threatening behavior. The three officers also stated that

open and he had to receive stitches because officers slammed him against a wall.

During our investigation, the OIG asked the detainees individually to identify the officers who had committed the abuse through photographic lineups. The detainees identified many of the same officers as the perpetrators, and the OIG focused its investigation on eight officers. The OIG interviewed seven of these officers. Six of them denied physically or verbally abusing any of the detainees or witnessing any other officer abuse the detainees. Five remembered at least one of the detainees and some of them remembered a few of the detainees. Two officers described two detainees as disruptive and uncooperative. One of the officers explained that the high-security procedures in place during the weeks following the September 11 attacks required four officers to physically control inmates during all escorts; face them toward the wall while waiting for doors, elevators, or the application and removal of leg restraints; and place them against the wall if they became aggressive during these escorts.

The seventh officer interviewed by the OIG told us that he witnessed officers "slam" inmates against walls and stated this was a common practice before the MDC began videotaping the detainees. He said he did not believe these actions were warranted. He said he told MDC officers to "ease up" and not to be so aggressive when escorting detainees. He also said he witnessed a supervising officer slam detainees against walls, but when he spoke with the officer about this practice the officer told him it was all part of being in jail and not to worry about

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they did not throw the detainee against the wall, twist his wrist, or place him in a cell naked and without a blanket.

it. The seventh officer signed a sworn affidavit to this effect. In a subsequent interview with the OIG, this officer recharacterized the action as "placing" the detainees against the wall, and said he did not want to use the word "slam." He denied that the officers acted in an abusive or inappropriate manner.

The OIG reviewed the detainees' medical records. The medical records do not indicate that most of the detainees received medical treatment for the injuries they asserted they received from officers. Two of the detainees' medical records indicate they were treated for injuries that they later claimed were caused by officers, but the medical records did not indicate that they alleged their injuries were caused by officers at the time they were treated. One detainee's records do not mention the cause of the injury and the other detainee's records state the detainee said he was injured when he fell. In his interview with the OIG, the detainee alleged his chin was badly cut when detention officers slammed him against the wall. He said that nobody ever asked him how his injury occurred. The other five detainees did not seek treatment for their alleged injuries.

Based on the scarcity of medical records documenting injuries and the lack of evidence of serious injuries to most of the detainees, the U.S. Attorney's Office for the Eastern District of New York and the Civil Rights Division declined criminal prosecution in this case. All of the detainees, with the exception of one, now have been removed from the United States. Nevertheless, the OIG is continuing its investigation of these allegations as an administrative matter. Because this case is ongoing, we are not describing in detail all the evidence in the case about the detainees' allegations. However, we believe there is evidence supporting the detainees' claims of abuse, in-

cluding the fact that similar—although not identical—allegations of abuse have been raised by other detainees, which we describe in the next section.

### C. FBI and BOP Investigations of Abuse

Four cases alleging physical abuse of September 11 detainees at the MDC were referred to the FBI for investigation. Another two complaints of abuse were referred to the BOP's internal affairs office for review. As we summarize below, the FBI closed three of these cases and one FBI case remains open. The BOP closed one case due to the resignation of an employee and closed the other as unsubstantiated after conducting an investigation.

In each of the four cases assigned to the FBI, the detainee alleged that he was "slammed" against a wall or door by MDC correctional officers and was injured as a result. Two of the detainees also alleged that they were threatened by MDC correctional officers and incurred additional physical abuse, such as being kicked by officers or having the chain on their leg restraints stepped on by officers. The detainees' complaints were forwarded initially to the Department's Civil Rights Division, which after a delay in two of the cases assigned them to the FBI to investigate. In two of the cases sent to the FBI, the detainees already had been removed by the time the FBI received the complaints and were not interviewed. In another case, the detainee was removed six months after the FBI received the case, but was not interviewed. The FBI did not attempt to locate these removed detainees or to interview the correctional officers. The Civil Rights Division declined prosecution of the three cases, and the FBI subsequently closed its investigations.

In the one case that the FBI has not yet closed, the detainee complained in May 2002 that he was slammed

into a wall, unnecessarily strip searched, and physically abused by MDC officers. The FBI received the case in July 2002, and opened an investigation in September 2002. As of March 19, 2003, however, the FBI had not interviewed the detainee or any officers.

In one of the cases referred to the BOP, the correctional officer who allegedly physically and verbally abused the detainee resigned during the investigation, and as a result the BOP closed the matter without further investigation. In the other case, the BOP interviewed the detainee, reviewed his medical records, and had his alleged injuries medically examined. The medical department did not find any injuries and the detainee's medical records do not indicate any injuries around the time of the alleged abuse. The BOP also interviewed two subjects and a supervising officer who witnessed the detainee's transfer. All three officers denied abusing the detainee and stated that during a routine cell rotation, the detainee began cursing and threatening the subjects. The BOP closed its investigation as unsubstantiated.

Based on the similarity of the allegations in these FBI and BOP cases to the ongoing OIG investigation, the OIG has decided to complete the investigations of the FBI and BOP cases and incorporate the relevant allegations from these cases into our ongoing investigation.

**D. Allegations of Harassment**

All 19 detainees we interviewed also complained of other types of harassing behavior by MDC staff while they were housed in the ADMAX SHU, such as staff banging on their cell doors or telling detainees to "shut up" while they were praying. All 19 detainees told the OIG that MDC officers banged on their cell doors for the midnight inmate count. When we questioned MDC staff about these allegations, they told us that they were re-

sponsible for ensuring that the detainees were alive during the nightly count and that banging on the cell doors was their method of waking the detainees. We confirmed that, according to BOP Program Statement 5511.06, Inmate Accountability, "Staff conducting counts shall ensure the observance of a real person and not a 'dummy.' When conducting a count, the staff member must personally observe a living breathing human body for each inmate counted." MDC staff told us they banged on the cell door to satisfy the BOP's national policy requirement to ensure that a living human body was in each ADMAX SHU cell.[123]

September 11 detainees also told the OIG that their afternoon prayers often were interrupted by MDC officers who conducted a "stand-up count" at 4:00 p.m. daily in the ADMAX SHU. MDC officials said the detainees were informed about these daily counts, including the midnight count, in a 2-page document containing ADMAX SHU policies that each detainee was supposed to receive when he first entered the MDC. However, several detainees told the OIG that they did not sufficiently understand English or they did not realize they were supposed to stop praying for the count. Two September 11 detainees said they were disciplined for not standing up during the count by being deprived of social visits. According to MDC records, one detainee had his social visitation privileges suspended for 60 days, while another detainee had his privileges suspended for 90 days.

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[123] BOP national policy requires inmate stand-up counts at least five times per day but specifies times for only two of the counts—4:00 p.m. daily and 10 a.m. on weekends and holidays. The BOP's practice is to conduct at least one of the other counts sometime during the hours of darkness.

When we questioned MDC staff on this subject, one Lieutenant said he delayed the afternoon count until the detainees had completed their prayers. All the other Lieutenants and correctional officers we interviewed said they followed standard BOP regulations and did not delay the afternoon count to avoid interfering with detainees' prayers.

**E. Reporting Allegations of Abuse**

Even though the MDC has a formal process for inmates to file complaints of abuse, we found that MDC staff failed to inform the September 11 detainees about these procedures in a timely manner. As discussed previously, the Administrative Remedy Program (ARP) is the BOP's formal procedure for filing allegations of physical or verbal abuse against facility staff. While the ARP is discussed in the MDC's facility handbook, only 1 of the 19 detainees we interviewed said he received this handbook when he arrived at the MDC in October 2001. The other 18 detainees we interviewed told us that they did not learn about this complaint resolution process until they received their facility handbooks several months after their arrival at the MDC.[124]

Of the 19 detainees we interviewed, 5 who said they never received facility handbooks told the OIG that they only learned about the ARP from other detainees in the

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[124] During intake screening at BOP facilities, a facility handbook normally is provided to the inmate and prison staff annotates the inmate's intake form to reflect that the inmate has received the handbook. When we examined the intake forms for the 19 September 11 detainees we interviewed, all forms were annotated to reflect that each detainee had received a handbook, which suggested that the handbook was given to the inmate but was quickly confiscated because it was on the list of forbidden items.

ADMAX SHU. Ten detainees said they received a handbook four to six months after arriving at the MDC, while three other detainees said they received a handbook within a month of arriving at the MDC.[125] One detainee did not respond to the question about when he received a facility handbook.

All 19 detainees told the OIG that they either were informed verbally about ADMAX SHU policies or they received a 2-page explanation of the policies instead of the complete MDC facility handbook. We found, however, that this 2-page summary of MDC policies did not include a description of the ARP process.

The Associate Warden for Programs told the OIG that all September 11 detainees were provided with a handbook when they were processed into the MDC. She suggested that it was possible that correctional officers confiscated the handbook from the detainees as an unacceptable item in their ADMAX SHU cell. The two-page document, "Special Housing Unit Rules and Regulations," included a list of items that the detainees could retain in their ADMAX SHU cells. These items included certain clothing items, facility-provided linen, specified personal items, and select hygiene items. The list of permitted items did not include a facility handbook. Therefore, according to the Associate Warden for Programs, because the facility handbook was not on the list, correctional officers may have confiscated the handbook. On October 17, 2001, the MDC changed its policy to permit detainees to retain the facility handbook in their cells.

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[125] One of these three detainees said he did not receive a handbook until he was released into the MDC's general population in May 2002.

MDC officials could not explain why the detainees said that they did not receive the facility handbooks until months later. The Associate Warden also stated that some detainees might not have become familiar with the ARP process until several months after they arrived at the MDC because they did not understand English or had not read the handbook.

**F. MDC Videotapes**

MDC management took some affirmative steps to prevent potential staff abuse by installing security cameras in each September 11 detainee's cell in the ADMAX SHU and by requiring MDC staff to videotape all movements of detainees to and from their cells. However, the MDC's policy that permitted staff to destroy or reuse these videotapes after 30 days hindered these efforts. As a result, the OIG, MDC management, and others were unable to use the videotapes to prove or disprove allegations of abuse raised by individual detainees.

According to interviews with BOP staff, the MDC installed cameras in its ADMAX SHU cells by mid-October 2001 pursuant to a national directive issued shortly after the September 11 attacks.[126] The directive required that cameras be installed in each cell housing a September 11 detainee. According to BOP and MDC officials, the security cameras were installed because the video record could help protect BOP staff from unfounded allegations of abuse. According to an "al Qaeda Training Manual" found by police in Manchester, England, during a search

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[126] This policy was communicated by BOP Assistant Director Michael Cooksey to all BOP Regional Directors in a series of video conference calls that occurred between September 13 and September 20, 2001.

of an al Qaeda member's home, terrorists incarcerated in the United States were urged to distract Government officials by claiming mistreatment. Consequently, the BOP was concerned that specious allegations of abuse would consume valuable administrative and legal resources.

David Rardin, the former BOP Northeast Region Director, directed in an October 9, 2001, memorandum to Northeast Region Wardens (including the MDC) that any movement of a September 11 detainee outside of his cell must be videotaped. According to Rardin's memorandum, the videotape policy was intended to deter unfounded allegations of abuse made by September 11 detainees and to substantiate abuse if it occurred.

Rardin also directed that these videotapes of detainee movements and tapes of detainees in their cells were to be preserved "indefinitely." However, by December 18, 2001, after the MDC had accumulated hundreds of videotapes, Mickey Ray, Rardin's successor as the BOP's Northeast Region Director, revised the policy for retaining surveillance videotapes from "indefinitely" to 30 days, except for incidents involving use of force by BOP staff. According to instructions from Ray, tapes that showed use of force by MDC staff against detainees were to be preserved for "evidentiary use." Tapes that did not show use of force against detainees could be reused on the 31st day. Acting on Ray's new policy, MDC Warden Zenk and the MDC Captain told the OIG that correctional staff destroyed hundreds of tapes to free up storage space at the MDC.

Consequently, videotapes that could have helped prove or disprove allegations of abuse raised by detainees were not available. The lack of videotape evidence hampered the OIG's investigation of detainee abuse complaints.

[PAGES 151 THROUGH 157 OMITTED]

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## VIII. OIG ANALYSIS

In the aftermath of the September 11 attacks, 184 aliens arrested on immigration charges were confined in high-security federal prisons, as opposed to less restrictive INS detention facilities. Eighty-four of these aliens were held at the MDC in Brooklyn, New York. These MDC detainees were held under "the most restrictive conditions possible," which included "lockdown" for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells. To this end, the MDC created an ADMAX SHU specifically to confine the September 11 detainees.

The BOP played no role in deciding the security risk posed by individual September 11 detainees or their potential connections to terrorism. As discussed in Chapter 4, these decisions were made by the FBI in consultation with the U.S. Attorney's Office in the Southern District of New York and were communicated to the INS, whose agents generally arrested the aliens as part of a Joint Terrorism Task Force effort.

However, once the FBI characterized a detainee as "high interest" and the INS transferred the detainee to BOP rather than INS custody, the BOP took responsibility for the detainee's confinement. In the heightened state of alert after the terrorist attacks, the BOP combined a series of existing policies and procedures that applied to inmates in other contexts and applied them to the detainees they received after September 11, such as designating September 11 detainees as WITSEC inmates.

As a threshold matter, we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees. The arresting FBI agent usually made this assessment without any guidance and based on the initial detainee information available at the time of arrest. In addition, there was little consistency or precision to the process that resulted in detainees being labeled "high interest," "of interest," or "of undetermined interest." While many of these decisions needed to be made quickly and were based on less than complete information, we believe the FBI should have exercised more care in the classification process, given the significant ramifications on detainees' freedom of movement and association depending on whether they were confined in a high-security facility such as the MDC or a less restrictive facility such as Passaic (discussed in Chapter 8). More important, as discussed in Chapter 4, the FBI devoted insufficient resources to investigating or clearing most of these detainees, resulting in their prolonged confinement under extremely high security conditions. Even after clearance, the BOP's delay in notifying the MDC lengthened even further these detainees' stay in the ADMAX SHU.

With regard to the conditions of confinement for detainees at the MDC, we appreciate that the influx of high-security detainees stretched MDC resources to their limit, with MDC staff members often working double shifts to monitor the detainees during a highly emotional period of time. We also appreciate the uncertainty surrounding these detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks. However, our review raises serious questions about the treatment of the September 11 detainees housed at the MDC in several regards.

First, BOP officials imposed a "communications blackout" specifically for September 11 detainees within a week of the terrorist attacks. During this blackout period, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any telephone calls or send mail. While we were unable to determine the exact length of this communications blackout, it appears to have lasted several weeks, after which time the September 11 detainees were permitted limited attorney and social contacts. During this time, attorneys and family members were unable to receive any information about these detainees, including where they were being held. While such a policy was within the BOP's discretion, we question the justification for a total communications blackout on all these individuals, particularly for the length of time that it was imposed. In addition, the telephone limitations imposed on this group of detainees—one legal telephone call per week and one social call per month—further hindered the detainees' ability to obtain legal assistance, which posed a significant problem since the majority of the detainees entered the MDC without counsel.

Second, as noted above, the BOP initially designated all September 11 detainees as WITSEC inmates. Usually, this designation is applied to individuals who agree to cooperate with law enforcement by providing testimony against criminal suspects. Application of this WITSEC classification to the September 11 detainees, however, resulted in MDC officials continuing to withhold information about the detainees' location, even after the communications blackout was lifted.

This classification frustrated efforts by the detainees' attorneys, family members, and even law enforcement officers to determine where the detainees were being

held. Because information on WITSEC inmates is tightly restricted, even MDC staff working at the front desk in the facility's lobby did not have access to information about the September 11 detainees. We found that MDC staff frequently—and mistakenly—told people who inquired about a specific detainee that the detainee was not held at the facility when, in fact, the opposite was true. Instead, the staff referred the caller or visitor to the BOP's Inmate Locator system for information about where an individual detainee was being held. But WITSEC inmates are not listed in this public system because of security reasons, and this prevented attorneys or family members from locating these September 11 detainees. We fault the MDC for not considering in a more timely manner the implications of labeling these September 11 detainees as WITSEC detainees and for not properly communicating to its employees—especially its staff who worked the facility's front desk—about the classification issues affecting September 11 detainees and how to properly address inquiries from the public.

The BOP tried at least twice to address this situation by reclassifying the September 11 detainees, first by renaming them "Group 155" inmates. Even then we found the BOP continued to use "WITSEC" as its primary designation. On October 31, 2001, the BOP reclassified the detainees as "Special SIS Cases." Neither reclassification alleviated the access issues confronted by detainees' attorneys and family members. In fact, we found that as late as March 1, 2002—more than six months after the first September 11 detainees arrived at the MDC—the BOP's initial decision to classify the detainees as WITSEC inmates continued to cause confusion and resulted in attorneys being told incorrectly that their clients were not being held at the MDC.

We understand the MDC's efforts to follow instructions from BOP Headquarters and confine the September 11 detainees under secure conditions. That said, the detainees were pretrial inmates, most of whom had not obtained legal representation by the time they were confined at the MDC. Consequently, their designation by BOP officials as WITSEC inmates hindered the detainees' efforts to contact legal counsel and their families. We also believe the BOP should have taken timelier and more effective steps to address the situation after it realized the impact this designation was having on the September 11 detainees and the ability of their attorneys and families to locate them.

Third, with regard to the policies within the MDC for confining the September 11 detainees, MDC officials used existing BOP policies applicable to inmates in disciplinary segregation, and confined the September 11 detainees in the ADMAX SHU. The detainees were placed in restraints whenever they were outside their cells, including handcuffs, leg irons, and heavy chains. Four staff members were required to be present each time a detainee was placed into restraints and escorted from a cell. The detainees also were required to remain in restraints during their non-contact visits with their attorneys or family members.

Because of these restrictive conditions, we believe it was important for the FBI, INS, and BOP to determine, in a reasonable time frame, whether these detainees were connected to terrorism or whether they could be cleared to be moved from the ADMAX SHU to the MDC's much less restrictive general population. Yet, detainees remained in the ADMAX SHU for a long period of time waiting for the FBI's clearance process which, as we described in Chapter 4, was excessively slow. Even when

the FBI cleared the detainees, they remained in the ADMAX SHU for days and sometimes weeks longer than necessary due to delays between the time the FBI cleared a detainee of a connection to terrorism and the time the MDC received formal notification of the clearance. In addition, we found that the MDC did not consistently follow its established procedures. Without explanation, it released at least four September 11 detainees from the ADMAX SHU prior to receiving clearance from the FBI that the detainee had no links to terrorism.

Fourth, the restrictive conditions imposed by the MDC prevented the detainees from obtaining counsel in a timely fashion. The BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Consequently, the policy regulating the frequency and duration of legal telephone calls established by the MDC for September 11 detainees—while complying with very broad BOP national standards—severely limited the detainees' ability to obtain and consult with legal counsel.

As mentioned previously, most September 11 detainees did not have legal representation prior to their detention at the MDC (only 2 of the 19 detainees we interviewed had hired legal counsel before they entered the MDC). The MDC imposed a policy that permitted September 11 detainees housed in the ADMAX SHU only one legal call per week. This type of policy is more appropriate for pre-trial inmates who have obtained counsel prior to their incarceration rather than for inmates like the September 11 detainees who needed to find counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees by the INS through EOIR contained inaccurate and outdated information. As a result, detainees

often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees. In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed legal call. We believe that counting calls that only reached a voicemail, resulted in a busy signal, or went to the wrong number was unduly restrictive and inappropriate.

In addition, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear and inappropriate. In many instances, the unit counselor inquired whether September 11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "are you okay?" For some period, several detainees told the OIG that they did not realize that an affirmative response to this rather casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?"

Our review determined that the MDC officials recognized their obligation to permit representatives from foreign consulates to visit with detainees and established a clearance procedure to facilitate these visits. However, we found that consular representatives experienced the same difficulties as attorneys in obtaining access to de-

tainees due to the BOP's categorization of the detainees as WITSEC inmates. In addition, the MDC's classification of detainee calls to their consulates as "social calls" severely limited the detainees' ability to contact their consulates in a timely manner, given the MDC's limit of one social call per month for detainees.

Fifth, the restrictive BOP policies and the classification of September 11 detainees also hindered family visits. Although MDC management tried to train reception area staff on proper procedures for granting visitation to detainee family members, problems persisted even many months after September 11.

Sixth, with regard to allegations of physical and verbal abuse, we concluded that the evidence indicates a pattern of abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks. Most detainees we interviewed at the MDC alleged that MDC staff physically abused them. Many also told us that that MDC staff verbally abused them with such taunts as "Bin Laden Junior" or with threats such as "you will be here for the next 20-25 years like the Cuban people." Although most correctional officers denied such physical or verbal abuse, the OIG's ongoing investigation of complaints of physical abuse developed significant evidence that it had occurred, particularly during intake and movement of prisoners.[130]

Seventh, MDC staff failed to inform detainees in a timely manner about the process for filing complaints

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[130] To date, our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it. However, our investigation is still ongoing.

about their treatment. Only 1 of the 19 detainees we interviewed said he received a facility handbook when he arrived that described the formal complaint process. Ten detainees told the OIG they did not learn about the complaint resolution process until they received their facility handbook 4 to 6 months after arriving at the MDC.

The Associate Warden for Programs told the OIG that all September 11 detainees received a facility handbook when they were processed into the MDC. Yet, even if the detainees received handbooks, staff apparently confiscated them as unacceptable items to retain in their ADMAX SHU cells. In addition, we found that a 2-page summary of MDC policies distributed to many of the detainees did not contain information about how to file a formal complaint. The haphazard fashion in which MDC staff handled dissemination of the facility handbook impeded the detainees' ability to seek review for their complaints about conditions of confinement at the MDC. If the detainees were not permitted to keep the facility handbook in their cells for security reasons, the MDC's 2-page summary of facility policies should have included information that described the process for filing a formal complaint.

Eighth, MDC staff appropriately took affirmative steps to prevent potential staff abuse against September 11 detainees—and protect MDC staff from unfounded allegations of abuse—by installing security cameras in each detainee's cell and by requiring staff to videotape all detainee movements outside their ADMAX SHU cells. However, the BOP's decision to permit MDC staff to destroy or reuse these videotapes after 30 days hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by individual detainees. We understand the difficulty in storing the hundreds of

videotapes the MDC accumulated after several months of taping the detainees. But the decision to recycle or destroy the videotapes created problems regarding allegations of physical abuse at the MDC. Detainees were unable to use videotape evidence to support allegations of abuse filed more than 30 days after an alleged incident. Similarly, MDC staff had more difficulty refuting abuse allegations raised by detainees if the complaint was filed more than 30 days after the incident.

Given the proactive steps taken to prevent or document incidents of physical abuse against September 11 detainees, we believe rescinding the videotape retention policy was unwise. If BOP and MDC management wanted to refute detainee allegations of abuse using videotape evidence, it was shortsighted on their part to assume that all such allegations would be made and resolved within 30 days.

Ninth, we found that recreation offered to the September 11 detainees was limited due to BOP security policies, the limited number of recreation cells within the ADMAX SHU, and lack of proper clothing that led detainees to regularly refuse recreation because it was offered most often in the early morning hours when it was colder in the open-air recreation cells.

Tenth, MDC staff subjected the September 11 detainees to having both lights illuminated in their cells 24 hours a day for several months longer than necessary, even after electricians rewired the ADMAX SHU range. Our review determined that, despite the initial representations to us by MDC officials, the MDC was able to reduce the amount of light in an individual detainee's cell as early as November 2001, but instead kept both cell lights illuminated until at least mid-March 2002. Eighteen of the 19 detainees we interviewed complained to the OIG

about the difficulty of sleeping with both lights illuminated 24 hours a day, citing exhaustion, depression, stress, and sleep deprivation. The MDC had little reason for keeping the lights constantly illuminated for as long as it did.

In sum, we recognize the uncertainties and confusion surrounding the initial policies and treatment relating to these September 11 detainees. Much about these detainees was unknown, and the BOP had to accept the FBI's loosely applied assessment of these detainees as "of interest" to the terrorism investigation. However, while we fault the FBI for the slowness of the clearance process, we believe the blackout and the initial WITSEC designation that the BOP imposed for several weeks was excessive, particularly because many of these detainees had no counsel or any contact with families. We also believe that the BOP instituted excessively restrictive policies on the detainees, particularly regarding telephone privileges. In addition, the BOP did not provide adequate information about the location of the detainees to the detainees' attorneys or their family members. These policies hindered the detainees' ability to obtain and consult with legal counsel and were more appropriate for detainees who had attorneys prior to arriving at the MDC. We also believe that some of the detainees were subject to physical or verbal abuse. Finally, we believe that some of the conditions of confinement were unnecessarily severe, such as two lights constantly illuminated in the detainees' cells. While the chaotic situation and the uncertainties surrounding the detainees' role in the September 11 attacks and the potential for additional terrorism explain some of these problems, they do not explain or justify all of them. We believe that the Department and the BOP

should consider these issues carefully in an effort to avoid similar problems in the future.

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## CHAPTER NINE
## OIG RECOMMENDATIONS

[PAGES 187 THROUGH 190 OMITTED]

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### VI. BOP Housing Of Detainees

At least 84 September 11 detainees arrested on immigration charges in connection with the September 11 investigation were confined at the MDC. The BOP housed these detainees in its ADMAX SHU under extremely restrictive conditions. While the BOP played no role in deciding which detainees were "of interest" or "of high interest" to the FBI, once detainees were transferred to one of its facilities the BOP assumed responsibility for the detainees' conditions of confinement.

The BOP combined a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement for September 11 detainees held at the MDC and other BOP facilities. For example, the BOP initially designated September 11 detainees as witness security (WITSEC) inmates, a categorization that restricted public knowledge of and access to the detainees. This designation frustrated efforts by detainees' attorneys, family members, consular officials, and even law enforcement officers to determine the detainees' location, given how tightly information about WITSEC inmates is held. In addition, the BOP's initial communications blackout and its policy of permitting detainees one legal call per week (coupled with arbitrary policies on whether reaching an answering

machine counted as the legal call), severely limited the detainees' ability to contact and consult with legal counsel.

10. We recommend that the BOP establish a unique Special Management Category other than WITSEC for aliens arrested on immigration charges who are suspected of having ties to terrorism. Such a classification should identify procedures that permit detainees' reasonable access to telephones more in keeping with the detainees' status as immigration detainees who may not have retained legal representation by the time they are confined rather than as pre-trial inmates who most likely have counsel. In addition, BOP officials should train their staff on any new Special Management Category to avoid repeating situations such as when MDC staff mistakenly informed people inquiring about a specific September 11 detainee that the detainee was not held at the facility.

11. Given the highly restrictive conditions under which the MDC housed September 11 detainees, and the slow pace of the FBI's clearance process, we believe the BOP should consider requiring written assessments from immigration authorities and the FBI prior to placing aliens arrested solely on immigration charges into highly restrictive conditions, such as disciplinary segregation in its ADMAX SHU. Absent such a particularized assessment from the FBI and immigration authorities, the BOP should consider applying its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

12. We found delays of days and sometimes weeks between when the FBI notified the BOP that a Sep-

tember 11 detainee had been cleared of ties to terrorism and when the BOP notified the MDC that the detainee could be transferred from its ADMAX SHU to the facility's general population, where conditions were decidedly less severe. We recommend that BOP Headquarters develop procedures to improve the timeliness by which it informs local BOP facilities when the detention conditions of immigration detainees can be normalized.

13. We found evidence indicating a pattern of physical and verbal abuse by some MDC corrections staff against some September 11 detainees. While the OIG is continuing its administrative investigation into these matters, we believe MDC and BOP management should take aggressive and proactive steps to educate its staff on proper methods of handling detainees (and inmates) confined in highly restrictive conditions of confinement, such as the ADMAX SHU. The BOP must be vigilant to ensure that individuals in its custody are not subjected to harassment or more force than necessary to accomplish appropriate correctional objectives.

14. BOP and MDC officials anticipated that some September 11 detainees might allege they were subject to abuse during their confinement. Consequently, they took steps to help prevent or refute such allegations by installing cameras in each ADMAX SHU cell and requiring staff to videotape all detainees' movements outside their cells. Unfortunately, the MDC destroyed the tapes after 30 days. We recommend that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism housed in ADMAX SHU units be retained for at least 60 days.

15. We recommend that the BOP ensure that all immigration detainees housed in a BOP facility receive full and timely written notice of the facility's policies, including procedures for filing complaints. We found that the MDC failed to consistently provide September 11 detainees with details about its Administrative Remedy Program, the formal process for filing complaints of abuse.

16. Some MDC correctional staff asked detainees "are you okay" as a way to inquire whether they wanted their once-a-week legal telephone call. Detainees told the OIG that they misunderstood this question and, consequently, unknowingly waived their opportunity to place a legal call. We recommend that the BOP develop a national policy requiring detainees housed in SHUs to affirm their request for or refusal of a legal telephone call, and that such affirmance or refusal be recorded in the facility's Legal Call Log.

17. We recommend that the MDC examine its ADMAX SHU policies and practices in light of the September 11 detainees' experiences to ensure their appropriateness and necessity. For example, we found that while the MDC offered September 11 detainees exercise time in the facility's open-air recreation cell, they failed to provide suitable clothing during the winter months that would enable the detainees to take advantage of this opportunity. In addition, we found that the MDC kept both lights on in the detainees' cells 24 hours a day for several months after they had the ability to turn off at least one of the cell lights.

[PAGES 194 THROUGH APPENDIX K OMMITTED]

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# IN THE
# Supreme Court of the United States

DENNIS HASTY, *et al.*,

*Petitioners,*

v.

IBRAHIM TURKMEN, *et al.*,

*Respondents.*

On Petitions for Writs Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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*Petitioners,*

v.

IBRAHIM TURKMEN, *et al.*,

*Respondents.*

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JAMES W. ZIGLAR,

*Petitioner,*

v.

IBRAHIM TURKMEN, *et al.*,

*Respondents.*

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## QUESTIONS PRESENTED

1. Whether this action, seeking damages from federal officials for violating the constitutional rights to due process of law and equal protection of the laws of persons detained in a federal correctional facility, presents a novel context for the remedy authorized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the detailed factual allegations in this case, which are supported by a Department of Justice Report and specifically exclude the "obvious alternative explanation" that was dispositive in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), state a claim under Federal Rule of Civil Procedure 12(b)(6).

3. Whether selecting certain non-citizens for solitary confinement and other punitive treatment based solely on their race, religion, ethnicity, or national origin, without any basis to suspect a connection to terrorism, violated these individuals' clearly established constitutional rights to due process of law and equal protection of the laws.

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## INTRODUCTION

Respondents are non-citizens who were arrested on civil immigration charges and thereafter subjected to the most restrictive conditions of administrative segregation that exist in the federal prison system. *Cf. Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting the "terror and peculiar mark of infamy" experienced by prisoners in segregation (quoting *In re Medley*, 134 U.S. 160, 170 (1890))). Although they were detained in the weeks following the tragic attacks of September 11, 2001, Respondents were not actually suspected of terrorism. Nonetheless, under Petitioners' orders, they were treated "*as if* the FBI had reason to believe [they] had ties to terrorist activity," simply because they were (or appeared to be) Arab or Muslim, and were "encountered – even coincidentally – in the course of" a terrorism investigation. App. 36a (emphasis added).[1]

Respondents' allegations are detailed and substantiated. As the court of appeals noted, the Justice Department's own investigation supports the claim that Petitioners "knew of, and approved, [Respondents'] confinement under severe conditions, . . . notwithstanding their knowledge that the government had no evidence linking [them] to terrorist activity." App. 47a-48a. The court of appeals correctly concluded that dismissal on the

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[1] "App." refers to the Appendix to the Petition for a Writ of Certiorari filed by Petitioners Ashcroft and Mueller (No. 15-1359).

pleadings would be improper, and that Respondents should be permitted to go forward and attempt to prove their case.

None of the considerations traditionally warranting certiorari are present. There is no circuit split requiring this Court's resolution, and no need to replicate the Second Circuit's careful, fact-bound review of the pleadings. The petitions instead boil down to a request for a new and remarkable form of immunity, one in which the clearly unconstitutional actions of federal officials are untouchable so long as they occur in temporal proximity to a national tragedy. Jarringly, Petitioners insist that they were entitled to hold Arab and Muslim men in the most restrictive conditions "*even 'in the absence of individualized suspicion of terrorist connections.*'" Ashcroft Pet. 23 (quoting App. 141a (Raggi, J., dissenting)) (emphasis added).

The Court should not entertain that request. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). Respondents allege that Petitioners knowingly and flagrantly deviated from that framework, without any legitimate justification. Of course, if the evidence does not support those allegations, Petitioners will prevail, potentially before any trial. But if Respondents can prove their allegations that Petitioners targeted them for mistreatment *knowing* that all they were "suspected" of was being a member of a particular race or religion, the talismanic

invocation of national security should not trump accountability before the law.

## STATEMENT

Respondents are non-citizens who were detained on civil immigration charges, placed in solitary confinement for periods ranging from three to eight months, and otherwise mistreated before being deported.[2] App. 252a-53a; 280a (Compl. ¶¶ 1-2, 76). Although they were encountered in connection with the 9/11 investigation as a consequence of their ethnic and religious backgrounds, there was never any individualized, non-discriminatory basis to suspect Respondents of terrorism. *Id.* Petitioners nonetheless orchestrated Respondents' detention and mistreatment, knowing that they were subjecting individuals with no ties to terrorism to unnecessary and punitive conditions of confinement. App. 267a, 274a, 276a (Compl. ¶¶ 47, 61, 67).

Respondents filed this lawsuit to seek accountability and redress for this flagrant violation of their clearly established constitutional rights. Following this Court's application of stringent pleading requirements in *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009), Respondents amended their complaint to include detailed factual allegations,

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[2] Petitioners Ashcroft and Mueller assert that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), also involved claims by "aliens who were arrested for immigration violations." Ashcroft Pet. 2. This is not accurate: unlike Respondents, Mr. Javaid Iqbal was arrested and detained on criminal charges. *Iqbal*, 556 U.S. at 666.

identifying the specific role played by each of the Petitioners and negating the "obvious alternative explanation" the Court had found present in *Iqbal*. In addition to relying on information gathered from earlier stages of discovery in this case and other sources, Respondents bolstered their allegations with two reports of the Justice Department investigating the misconduct at issue. *See* Office of Inspector Gen., U.S. Dep't of Justice, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (Apr. 2003), *available at* https://oig.justice.gov/special/0306/full.pdf ("OIG Rep."); Office of Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003), *available at* http://www.usdoj.gov/oig/special/0312/final.pdf ("Supp. OIG Rep."); *see also* App. 253a-54a (Compl. ¶¶ 3 n.1, 5 n.2) (incorporating by reference the two OIG reports except to the extent contradicted by allegations of the complaint).

The Second Circuit agreed that Respondents stated plausible claims for relief that should be permitted to move forward.

### A. Round-Up Of Middle Eastern Men Irrespective Of Individualized Suspicion Of Terrorism

The United States suffered tragic terrorist attacks perpetrated by Al Qaeda on September 11, 2001 ("9/11"). In the wake of these attacks, the Federal Bureau of Investigation ("FBI") set up a tip

line for civilians to supply information. App. 265a (Compl. ¶ 40). Ninety-six thousand "tips" were received in the first week, most of them involving nothing more than generic suspicions of Arabs and Muslims. *Id.*; *see also* OIG Rep. 16-17. For example, one of the original plaintiffs in this case "came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported 'that she rented an apartment in her home to several Middle Eastern men, and she would feel awful if her tenants were involved in terrorism and she didn't call.'" App. 8a n.9 (quoting App. 334a (Compl. ¶ 251)).

Petitioner Robert Mueller, then the Director of the FBI, ordered each of those tips investigated, even if the sole basis of "suspicion" was the individual's religion, ethnicity, country of origin, or race. App. 265a (Compl. ¶ 40). Petitioner John Ashcroft, then the Attorney General, directed Mueller to vigorously question any male aged 18 to 40 from a Middle Eastern country whom the FBI learned about. App. 265a (Compl. ¶ 41). He further instructed the Immigration and Naturalization Service ("INS"), headed by then Commissioner Petitioner James Ziglar, to round up every immigration violator who fit this profile. *Id.*

Ashcroft, Mueller, and Ziglar (together, the "DOJ Petitioners") understood and expected that their directives would sweep up many individuals in the targeted religious and ethnic groups with no reason to suspect them of terrorism. Indeed, each of them received daily reports of the arrests and detentions and were aware of the lack of information tying Respondents to terrorism. App. 265a, 267a-268a, 275a (Compl. ¶¶ 41, 47, 63-64).

One important aspect of the investigation that the DOJ Petitioners learned about in October 2001 was a list of individuals designated "of interest" to the 9/11 investigation by the New York field office of the FBI (the "New York List"). App. 267a-68a (Compl. ¶¶ 44, 47). They learned that individuals were placed on the New York List without vetting, and "without a determination by any FBI or other law enforcement officer that the non-citizen had engaged in any suspicious behavior, or identification of any reason to believe [that] the individual had information about terrorism or was involved in the 9/11 attacks." *Id.*; *see also* OIG Rep. 41-42, 53-57. Despite knowing of these flaws, Ashcroft ordered that everyone on this list be treated as "of interest" to the broader terrorism investigation, with the restrictive treatment that followed. *Id.* He made this decision despite significant internal criticism. *Id.*

As a result of the sweeps, at least 762 men were arrested, far exceeding the capacities of federal detention centers in the New York area. App. 268a (Compl. ¶ 49); OIG Rep. 20. Accordingly, many detainees were sent to non-federal facilities, but 84, including Respondents, were sent to the Metropolitan Detention Center ("MDC"), a federal jail in Brooklyn. OIG Rep. 111.

### B. Harsh And Punitive Conditions Of Detention

In the weeks after 9/11, Petitioners Ashcroft and Mueller "met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure" on the men

arrested as a result of their orders. App. 274a-75a (Compl. ¶ 61); *see also* OIG Rep. 39-40. The group decided to restrict detainees' ability to contact the outside world and delay their immigration hearings. App. 274a-75a (Compl. ¶ 61); *see also* OIG Rep. 19-20, 112-13. The DOJ Petitioners also directed that officers responsible for interacting with the detainees be told that they were suspected terrorists who "needed to be encouraged *in any way possible* to cooperate." App. 274a-75a (Compl. ¶ 61) (emphasis added).

Since Respondents' contact with the outside world could not be restricted in a general population unit at the MDC, Respondents were placed in an Administrative Maximum Special Housing Unit ("ADMAX SHU"). App. 276a-277a (Compl. ¶ 68). The ADMAX SHU was a solitary confinement unit[3] with the harshest conditions in the federal prison system, including: 23 to 24 hour-a-day lockdown in a cell; handcuffs, shackles, a waist chain, and the physical grip of at least three guards whenever a detainee was taken from his cell; redundant and humiliating strip searches; heavy restrictions on all forms of communication; denial of recreation; inadequate provision of hygiene and religious items;

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[3] Consistent with many "solitary" confinement units, some of the 9/11 detainees had cellmates. *See* U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing (Final Report), at 3 (Jan. 2016), *available at* https://www.justice.gov/dag/file/815551/download (noting that the term "solitary confinement" is defined by segregation from the general prison population, and lockdown in a cell, alone or with one other prisoner ("double-celling"), for 22 hours or more per day).

constant light in their cells; sleep deprivation; exposure to temperature extremes; and interference with religious practice. App. 279a-282a, 292a-300a (Compl. ¶¶ 76, 79, 83, 112-39); *see also* OIG Rep. 118-119, 152-56; *id.* at 121-24 (photographs of the ADMAX SHU). These conditions were prepared and imposed at the direction of Petitioners Dennis Hasty, then Warden of the MDC, and James Sherman, then Associate Warden for Custody (together, the "MDC Petitioners"). App. 279a-80a (Compl. ¶¶ 75-76).

Respondents were also abused in various ways by MDC guards (App. 290a (Compl. ¶105)), who had been informed that Respondents were connected to the September 11 attacks (App. 274a-75a (Compl. ¶ 61)). Petitioner Hasty facilitated this abuse by referring to Respondents as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. App. 280a-81a, 301a (Compl. ¶¶ 77, 140). As a result, correctional officers at MDC engaged in widespread and patterned physical, verbal, and religious abuse of the detainees, including slamming the handcuffed and shackled detainees into the wall during transports (breaking Respondent Mehmood's hand), stepping on their shackles and twisting their hands and fingers, calling them "fucking Muslims" and "camels," and shouting to interrupt prayer. *See* App. 290a-92a, 300a, 307a (Compl. ¶¶105, 109-10, 136, 162); *see also* Supp. OIG Rep. 28, 30. Though Hasty sought to avoid witnessing the implementation of his policies, he was made aware of the abuse nonetheless. App. 259a-60a (Compl. ¶ 24). Petitioner Sherman was frequently present on the ADMAX unit, yet he too failed to correct the abuses

he witnessed or learned of. App. 260a (Compl. ¶ 25). Videotapes that likely showed abuse were destroyed. App. 291a (Compl. ¶ 107); *see also* Supp. OIG Rep. 41-42.

Like the original decision to round them up in connection with the 9/11 investigation, Respondents' assignment to the ADMAX SHU was not based on any indication of a connection to terrorism. App. 253a-54a (Compl. ¶ 4). Petitioner Ashcroft ordered that respondents were to be held in these conditions (and their deportations delayed) until they were cleared of any connection to terrorism. App. 270a, 274a (Compl. ¶¶ 55, 61). Petitioner Mueller oversaw the clearance operation, and would not authorize release of Respondents even after the New York field office cleared them, awaiting a CIA name check. App. 271a (Compl. ¶ 57). Respondents and others languished for months in solitary confinement even after they had been cleared. *Id.*

### C. Respondents' Experiences

Respondents' arrests and subsequent treatment were consistent with a general pattern identified by the Justice Department's Office of the Inspector General. *See* OIG Rep. 40-42.

Respondents Ahmer Iqbal Abbasi and Anser Mehmood are Pakistani Muslims related by marriage. App. 256a (Compl. ¶¶ 13, 14). Both came to the attention of the FBI through an anonymous tip that a false social security card had been left at the New Jersey Department of Motor Vehicles by a "male[,] possibly Arab" using Abbasi's address; the card was left by a houseguest of Abbasi, but Abbasi was arrested for an immigration violation as a result.

App. 302a, 305a (Compl. ¶¶ 143, 152). While arresting Abbasi, the FBI came across the name of his sister Uzma, Mehmood's wife. App. 306a (Compl. ¶ 158). Uzma was caring for their infant son, so Mehmood requested that he be arrested in her place, and the FBI agreed, telling Mehmood that he faced only minor immigration charges and would be released shortly. App. 306a-07a (Compl. ¶ 159). Both Abbasi and Mehmood were detained for four months in the ADMAX SHU. App. 307a, 310a (Compl. ¶¶ 162, 170).

Respondent Benamar Benatta is an Algerian Muslim. App. 256a-57a (Compl. ¶15). He was detained by Canadian officials before September 11 while trying to enter Canada from the United States to seek refugee status (which was later granted). *Id.*; App. 310a-11a (Compl. ¶¶ 172-73). On September 12, 2001, Canadian officials reported Benatta's profile and presence in Canada to the FBI, and transported him to the United States. App. 310a-11a (Compl. ¶ 173). Benatta was detained in the ADMAX SHU for over seven months. App. 311a, 315a-16a (Compl. ¶¶ 174-75, 188). The conditions there had a profound effect on Benatta's mental health; while in custody he twice made serious attempts to injure himself. App. 312a-14a (Compl. ¶¶ 179-82).

Respondent Ahmed Khalifa is a Muslim from Egypt who came to the United States for a vacation from his medical studies. App. 257a, 318a (Compl. ¶¶ 16, 194). He and his roommates were arrested on immigration charges following a tip that several Arabs living at Khalifa's address were renting a post-office box, and perhaps sending out large quantities

of money. App. 318a (Compl. ¶ 195). He was detained in the ADMAX SHU for close to four months. App. 318a-19a, 322a (Compl. ¶¶ 197, 211).

Respondent Saeed Hammouda is also an Egyptian Muslim. He is the only respondent who still does not know what led to his arrest and detention. App. 257a (Compl. ¶ 17). He was held in the ADMAX SHU for eight months. App. 324a, 327a (Compl. ¶¶ 217, 227).

Respondent Purna Raj Bajracharya is a Nepalese Buddhist who overstayed a visitor visa to work in the United States and send money home to his wife and sons in Nepal. App. 257a, 327a (Compl. ¶¶ 18, 229). He came to the attention of the FBI when filming New York streets to show his wife and children. App. 328a (Compl. ¶ 230). A Queens County District Attorney's office employee told the FBI that an "Arab male" was videotaping outside a building that contained offices of the DA and the FBI, leading to Bajracharya's arrest and detention in the ADMAX SHU for three months. App. 328a, 329a, 332a (Compl. ¶¶ 232, 234, 244).

Others swept up in the 9/11 detentions who did not fit Ashcroft's profile had very different experiences. For example, five Israelis detained for allegedly celebrating on 9/11 were held in the MDC, but were allowed visits before Respondents or any other detainees, and were among the first released from the ADMAX SHU, without a clearance letter from FBI headquarters. App. 266a (Compl. ¶ 43). Other obviously non-Arab and non-Muslim arrestees were released immediately. *Id.*

### D. Decision Below

This *Bivens* action was filed by a different group of plaintiffs in April 2002, who had been detained at the MDC (the "MDC Plaintiffs") or the Passaic County Jail (the "Passaic Plaintiffs"). Following amendments, plaintiffs asserted claims on behalf of themselves and a putative class against thirty-one individual defendants, as well as claims against the United States.[4]

The district court dismissed plaintiffs' challenges to their detention and its duration, but allowed their conditions-of-confinement claims to proceed. *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006). Both sides appealed, and during the appeal the MDC Plaintiffs settled their claims against the United States for $1.26 million, agreeing to withdraw their claims against the individual defendants. The court of appeals (finding that the appeal was not moot) affirmed the dismissal of the unlawful detention claims, and remanded for the district court to consider leave to amend the complaint to add new MDC plaintiffs, and to satisfy the pleading standard articulated in *Iqbal*. *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009).

Following the amendments and joinder of Respondents, the defendants again moved to dismiss. The district court dismissed all claims by the Passaic Plaintiffs as well as Respondents' claims against

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[4] Plaintiffs sought class certification in 2005, but the motion was stayed.

Petitioners Ashcroft, Mueller, and Ziglar. The court denied the other defendants' motions. Respondents, the Passaic Plaintiffs, and Petitioners Hasty and Sherman, appealed.

The court of appeals affirmed the dismissal of the Passaic Plaintiffs' claims, but held that Respondents' claims survived the motions to dismiss. Although the DOJ Petitioners did not challenge the existence of a *Bivens* remedy on appeal (App. 21a), the Second Circuit addressed the issue, holding that a claim of punitive treatment in federal detention "stands firmly within a familiar *Bivens* context." App. 25a.

The court of appeals next canvassed the voluminous allegations and found that Respondents "plausibly plead" constitutional violations. The complaint alleged that the DOJ Petitioners were "aware" that immigration detainees were "being detained in punitive conditions of confinement in New York," and also knew that "there was no suggestion that those detainees were tied to terrorism except the fact that they were, or were perceived to be, Arab or Muslim." App. 31a-32a. The court concluded that the OIG Report "supports the reasonable inference that [the lack of suspicion for many detainees], known by other DOJ officials, came to the attention of the DOJ [Petitioners]." App. 37a. Without "individualized suspicion," the harsh conditions imposed on Respondents were "arbitrary or purposeless" in violation of the Due Process Clause. App. 58a.

The court of appeals likewise concluded that the allegations stated a plausible claim to relief under the Equal Protection Clause. The complaint

and OIG Report "g[a]ve rise to . . . reasonable inferences" that the FBI in New York targeted individuals "based on race, ethnicity, religion and/or national origin," and Petitioners knowingly merged the New York List with the nationwide list, subjecting individuals suspected of nothing to face the challenged conditions of confinement. App. 61a; *see also* App. 80a-81a. "[U]nlike in *Iqbal*, there was no legitimate reason to detain [Respondents] in the challenged conditions," and thus "no obvious, more likely explanation" for Petitioners' actions. App. 65a-66a.

The Second Circuit recognized that "[d]iscovery may show that" Petitioners "are not personally responsible for detaining [Respondents] in [the alleged] conditions," or that "national security concerns motivated the [Petitioners] to take action." App. 84a-85a. But "at this stage," the court could not conclude that individuals "caught up in the hysteria" by reasons of their "perceived faith or race" could constitutionally be subjected to "[t]he suffering [they] endured." *Id.* Without further development of the facts, the court of appeals could not assume that "violation[s] of the constitutional rights on which this nation was built" were justified. App. 85a.

## REASONS FOR DENYING THE PETITIONS

### I. Respondents' *Bivens* Claims Arise In A Familiar Context That Does Not Warrant Review.

Petitioners ask this Court to adopt striking new limitations on a traditional *Bivens* action challenging unconstitutional conditions of

confinement in a federal prison. Their crabbed approach to *Bivens* is not justified by decisions of this Court or supported by any of the circuit authority they cite. The Second Circuit's recognition of a *Bivens* remedy in this case does not merit review.

The basis of Respondents' claims is that Petitioners subjected them to harsh and punitive conditions of confinement in violation of their substantive due process and equal protection rights. The availability of *Bivens* claims for such constitutional violations is well-settled. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("[W]e have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause." (citing *Davis v. Passman*, 442 U.S. 228 (1979))); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) ("If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity"); *Dickerson v. United States*, 530 U.S. 428, 441-42 (2000) (describing a *Bivens* substantive due process claim as "available" for FBI misconduct during custodial interrogation); *Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J, dissenting) (*Bivens* action "is available to federal pretrial detainees challenging the conditions of their confinement").

The Second Circuit did not hold that a *Bivens* claim is automatically available so long as the right, framed at a high level of generality, has been previously recognized. Rather, the court recognized that the right *and* the "mechanism of injury" must be familiar, leaving ample basis for courts to pause

before endorsing exotic new theories. App. 27a; *see Chappell v. Wallace*, 462 U.S. 296, 300-04 (1983) (novel mechanism of injury involving the military chain of command); *Minneci v. Pollard*, 132 S. Ct. 617 (2012) (novel mechanism of injury involving private prison employee). Here, however, the mechanism of injury is familiar: by treating Respondents as suspected terrorists when they had no grounds for suspicion beyond race or religion, Petitioners mistreated federal prisoners, imposing "punitive conditions [of confinement] without sufficient cause." App. 25a; *see, e.g.*, *Carlson v. Green*, 446 U.S. 14, 17-20 (1980).

Petitioners disagree. They would have this Court reject *Bivens* liability for a familiar constitutional claim based on a familiar mechanism of injury, because previous *Bivens* decisions of this Court have not concerned the same class of plaintiffs (immigration detainees) or precisely the same factual circumstances (putative connection to a terrorism investigation). They would even erect a new form of immunity against *Bivens* claims for high-level officials who make a "policy" decision to violate the Constitution. This effort to slice and dice a *Bivens* claim has no foundation in this Court's precedents.

Notably, this Court in *Iqbal* questioned one novel *Bivens* claim (for First Amendment violations) *without* doubting the viability of an equal protection claim for mistreatment of detainees directed by high-level officials in the post-9/11 investigation. 556 U.S. at 669, 675. Indeed, this Court has had several opportunities to question *Bivens*' application to facts similarly distinct from prior *Bivens* cases, and has

not done so. *See Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (raising no question as to availability of *Bivens* Fourth Amendment challenge to pretextual detention as material witness); *Will v. Hallock*, 546 U.S. 345 (2006) (raising no question as to availability of *Bivens* claim for deprivation of property without due process); *Groh v. Ramirez*, 540 U.S. 551 (2004) (raising no question as to availability of *Bivens* Fourth Amendment unlawful search claim); *Wilson v. Layne*, 526 U.S. 603 (1999) (raising no question as to availability of *Bivens* Fourth Amendment challenge to media involvement in execution of search warrant);[5] *Farmer v. Brennan*, 511 U.S. 825 (1994) (raising no question as to availability of *Bivens* Eighth Amendment failure to protect claim). While Petitioners emphasize this Court's reluctance to "extend" *Bivens* into "any new context" (Ashcroft Pet. 13; Hasty Pet. 15; Ziglar Pet. 22), they ignore the many times this Court has allowed an application of *Bivens* to new facts to pass unremarked.[6]

Apart from these basic flaws in Petitioners' attempt to narrowly re-define "context," their specific

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[5] These Fourth Amendment decisions make it all the more remarkable that Petitioners Hasty and Sherman, going beyond the DOJ Petitioners' arguments, argue that repeated and abusive strip searches present a new context to which *Bivens* should not be extended. Hasty Pet. 22, 26.

[6] During this same period, the Court repeatedly questioned the availability of a *Bivens* First Amendment claim. *See Iqbal*, 556 U.S. at 675; *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012).

reasons why *Bivens* should not apply to the facts of this case are unpersuasive.

1. *"Immigration" Context.* Petitioners assert that no *Bivens* remedy should be recognized because Respondents' claims "implicate . . . immigration." Ashcroft Pet. 17. That is an odd way of describing a case that does not challenge any immigration proceeding or raise any question of immigration law. Respondents object to their mistreatment in custody, which had nothing to do with their immigration proceedings. What Petitioners mean is that this case implicates *immigrants*, and that non-citizens who are mistreated in a federal prison present a distinct "context" and should be denied a remedy.

But it is well-established that a federal detainee who is mistreated in custody has a *Bivens* claim. *See supra* p. 15. That cannot be the rule for citizens but not non-citizens. As Judge Easterbrook wrote for the *en banc* Seventh Circuit rejecting such a distinction under *Bivens*, "[i]t would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries." *Vance v. Rumsfeld*, 701 F.3d 193, 203 (7th Cir. 2012); *see also Hernandez v. United States*, 757 F.3d 249, 276 (5th Cir. 2014) (status as alien not a special factor counseling hesitation before recognizing *Bivens* remedy), *rev'd on other grds*, 785 F.3d 117 (5th Cir. 2015) (en banc).

Petitioners rely on three inapposite cases that arose from immigration proceedings. These cases took care *not* to imply that a non-citizen immigration

detainee has no *Bivens* conditions-of-confinement remedy. *See De La Paz v. Coy*, 786 F.3d 367, 373-74 (5th Cir. 2015) (acknowledging and distinguishing prior *Bivens* cases addressing physical abuse of non-citizens in immigration detention); *Alvarez v. U.S. Immig. and Customs Enf.*, 818 F.3d 1194, 1208 n.6 (11th Cir. 2016) (distinguishing *Turkmen* conditions-of-confinement challenge); *Mirmehdi v. United States*, 689 F.3d 975, 979-80, 986 (9th Cir. 2012) (Silverman, J, concurring) (emphasizing that the "case does not present the issue of whether illegal immigrants could *ever* bring a *Bivens* action"). Of critical importance in these cases was that the plaintiffs' complaints "[could] be addressed in civil immigration removal proceedings," *De La Paz*, 786 F.3d at 369 – something that is plainly not true for Respondents' claims, which have nothing to do with their removal. Whether or not the Immigration and Naturalization Act offers an adequate alternative remedy in cases to which it applies, it has no application here. *Cf. Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (highlighting the availability of "adequate alternative damages action" as the reason for not extending *Bivens* to a new context). Notably, although the Solicitor General here suggests that the decision below contradicts *De La Paz*, elsewhere he has expressly acknowledged that it "does not conflict with *Turkmen*." Br. in Opp., *De La Paz v. Coy*, No. 15-888, 2016 WL 2866091, at *28 (May 13, 2016).

2. *"National Security" Context.* Petitioners also argue that the instant claims present a new "context" that should be excluded from *Bivens* because they "implicate . . . national security." Ashcroft Pet. 17. That characterization is misleading

and requires Petitioners to contradict the complaint: a fundamental allegation is that Respondents were detained in restrictive conditions even though Petitioners knew there was no reason to suspect them of any connection to terrorism. Respondents complain of their domestic detention under conditions of confinement directed by the Justice Department and implemented in the federal Bureau of Prisons, imposed notwithstanding the lack of any evidence tying them to terrorism. Applying well-established constitutional rules to such mistreatment is a familiar task for federal courts, not a novel "context."

When courts have declined to extend *Bivens* to the "national security" context, they have meant something much more specific. Petitioners misleadingly claim that other circuits have rejected *Bivens* claims concerning the treatment of "federal detainees" in a "range of sensitive contexts," Ashcroft Pet. 16, but omit a crucial fact: these cases involve *military* detention. *Vance*, 701 F.3d at 198-203 (wartime torture by military contractors in Iraq); *Doe v. Rumsfeld*, 683 F.3d 390, 393-397 (D.C. Cir. 2012) (wartime torture by military personnel in Iraq); *Lebron v. Rumsfeld*, 670 F.3d 540, 552-556 (4th Cir. 2012) (abuse of enemy combatant held in military custody in United States); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (wartime torture by military personnel in Iraq and Afghanistan); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (torture of Guantanamo detainees by military personnel).

In each of these cases, the mechanism of injury was abuse in military detention, which presents a different context than abuse in a Bureau

of Prisons facility in New York. Similarly, in *Meshal v. Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015), the mechanism of injury was a "[criminal] terrorism investigation conducted *overseas*." *Id.* (emphasis added); *see id.* at 430 (Kavanaugh, J, concurring) ("[N]ever before has a federal court recognized a *Bivens* action for conduct by U.S. officials abroad. *Never.*").

Expanding *Bivens* into a new context justifies an inquiry into special factors counseling hesitation, including those related to national security. But a *Bivens* claim for mistreatment in a federal jail in New York where "punitive conditions [were imposed] without cause" presents no such concerns. App. 24a-25a. If an individual is actually charged and convicted of a terrorist offense, and then mistreated in prison, he would surely have a *Bivens* remedy. *See Carlson v. Green*, 446 U.S. 14 (1980) (recognizing Eighth Amendment *Bivens* claim without considering prisoner's crime of conviction). A pre-trial detainee charged with a terrorist offense, held and abused in the same facility, would also have a *Bivens* claim. *See e.g.*, *Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012) (recognizing pre-trial detainee's claim without considering nature of criminal charge); *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006) (same); *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002) (same for immigration detainee). It would be remarkable to conclude that Respondents, who were never actually suspected of anything relating to terrorism beyond sharing a "suspect" race or religion, have no remedy for their mistreatment.

Even if the relationship of this case to the 9/11 investigation were sufficient to transform a

traditional *Bivens* context into a "new" one, there would still be no special factors counseling hesitation. There is no danger of "congressionally uninvited intrusion into military affairs by the judiciary." *Vance*, 701 F.3d at 200 (quoting *Chappell*, 483 U.S. at 683). Petitioners' argument that "national security" is still at issue is circular: they treated Respondents *as though* they raised national security concerns even though they did not, and on that basis claim that "national security" insulates their actions. This Court has warned that "the label of 'national security' may cover a multitude of sins," and that is just what Petitioners attempt here. *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (denying absolute immunity to Attorney General in *Bivens* challenge to national security wiretap).

3. *Immunity for "Policymakers."* Finally, Petitioners suggest that high-level officials' "policies" that violate the Constitution are exempt from *Bivens* liability. Ashcroft Pet. 17. This theory has no support, and would lead to plainly untenable results.

Petitioners quote *Malesko* for the proposition that *Bivens* is not "a proper vehicle for altering an entity's policy." 534 U.S. at 74. But they wrest that language from its context. The issue in *Malesko* was not whether *Bivens* applied to constitutional violations done as a matter of policy, but to claims against a non-public *entity*. In deciding that it did not, the Court noted that prisoners at private facilities had access to *both* a tort remedy under state law *and* actions for injunctive relief to alter the prison's policies. *Id.* at 72-74. Nowhere did the Court suggest that a plaintiff with no alternative remedy could lose access to *Bivens* simply because

the constitutional violation was done as a matter of policy.[7]

Petitioners' suggestion is especially unfounded in light of this Court's approach to *Iqbal*. There too the plaintiff sued the former Attorney General and FBI director, but the Court never intimated that these officials' "policymaking" responsibilities immunized them from a *Bivens* claim. To the contrary, the Court cast doubt on only one of two *Bivens* claims in the case, for a First Amendment violation, while indicating that an Equal Protection *Bivens* claim against those defendants was proper. 556 U.S. at 675; *see also Carlson v. Green*, 446 U.S. 14, 19 (1980) ("Petitioners [including the director of the BOP] do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.").

Barring *Bivens* suits for clearly unconstitutional policies would effectively grant high-ranking officials absolute immunity – the opposite of what this Court decided in *Mitchell*. 472 U.S. at 522-23 (refusing Attorney General's request for absolute immunity from *Bivens* claim). High-level officials act by setting policy. When the Attorney General orders his subordinates to engage in racial or religious profiling, or to hold immigration

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[7] Petitioners (Ashcroft Pet. 18) also quote *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), which merely *questioned* whether status as a policymaker might qualify as a special factor. It does not hold or even suggest that all decisions by high-ranking officials are "executive policy" that are immune from *Bivens*. *Id.* at 574.

detainees in solitary confinement as if they were terrorists without any suspicion that they are, he may be setting "policy," but he is also a federal officer violating clearly established constitutional rights. If anything, it is even *more* vital to our system of government to ensure accountability for the high-ranking official who orders clearly unconstitutional treatment, and not just lower-level "rogue" officers. *See Butz v. Economou*, 438 U.S. 478, 505-506 (1978) ("It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority."). In asking for immunity nonetheless, Petitioners would have this Court abandon the principle that "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882).

* * *

Respondents' claims reside firmly in the *Bivens* heartland. The court of appeals' recognition of their *Bivens* remedy "provide[s] an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally," *Malesko*, 534 U.S. at 70 (emphasis omitted), and the federal courts have extensive expertise in evaluating the claims in question. *See Davis*, 442 U.S. at 245; *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007). Petitioners' objections are supported by no decision of this Court, and implicate no split of authority among the circuit courts. Review of the Second Circuit's application of *Bivens* to the facts of this case is unnecessary.

## II. The Court Of Appeals' Fact-Intensive Evaluation Of The Pleadings Does Not Warrant Review.

Petitioners further argue that this Court should grant review because they disagree with the court of appeals' application of well-established pleading requirements. That fact-bound decision does not warrant review, and in any event is correct.[8]

Respondents allege – with specificity, and with support from the Justice Department's OIG Report – that Petitioners knowingly subjected them to unnecessary, punitive, and discriminatory conditions of confinement. Specifically, they allege that the DOJ Petitioners personally devised a plan to hold Arab and Muslim immigration detainees in unnecessarily restrictive conditions, knowing that there was no reason to suspect many such detainees (including Respondents) of any connection to terrorism. App. 265a-68a, 274a, 276a (Compl. ¶¶ 39-44, 47 61, 67). And they allege that the MDC Petitioners implemented that strategy of treating Respondents as if they were terrorists by subjecting them to cruel mistreatment. App. 276a-81a (Compl. ¶¶ 68-78.

Petitioners disagree with the Second Circuit's carefully reasoned conclusion that Respondents'

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[8] Petitioners address qualified immunity before assessing the sufficiency of the pleadings. Their apparent reason for doing so is that a key to their plea for immunity is ignoring the actual allegations in the complaint. *See infra* § III. Respondents begin with the logically prior question of the adequacy of the allegations.

detailed factual allegations state a plausible claim, attempting to pick apart the "premises" of the court of appeals' decision. Ashcroft Pet. 28-29. What Petitioners deride as speculative "premises" are actually factual allegations and reasonable inferences – ones not present in *Iqbal* – which must be "accepted as true." *Iqbal*, 556 U.S. at 678:

- The first "premise" Petitioners criticize is that Petitioners "made or approved the decision to merge" the New York List into the broader INS Custody List. Ashcroft Pet. 28. That premise is based on the Complaint. App. 267a-68a (Compl. ¶ 47).

- The second "premise" Petitioners criticize is that they acted despite knowing that the list included individuals detained "because of their ethnicity or religion . . . without a determination that there was a reason to suspect them of links to terrorism." Ashcroft Pet. 28. That premise is based on the Complaint. App. 265a, 275a-76a (Compl. ¶¶ 41, 63-64, 67); *see also* OIG Rep. 45, 47 ("soon became evident that many of the people arrested" were not suspected of ties to terrorism).

- The third and fourth "premises" Petitioners criticize are that they knew that some detainees "were being detained in the ADMAX SHU," and that they knew how restrictive such detention was. Ashcroft Pet. 28. Those premises are also based on the Complaint. App. 275a-76a (Compl. ¶¶ 61, 65, 67); *see also* OIG Rep. 2, 5, 19-20, 112-13 (further support that high-level DOJ officials were aware of

detention in the ADMAX SHU). Given the unusually close attention Petitioners paid to detainees such as Respondents, it would have been "implausible [that] they did *not*" know. App. 38a (emphasis altered).[9]

Unable to deny that these "premises" are supported by the Complaint, the OIG Report, and the reasonable inferences to which a plaintiff is entitled on a motion to dismiss, Petitioners attempt to minimize them as "pure speculation," and question whether they are based on personal knowledge. Ashcroft Pet. 29 (quoting App. 129a (Raggi, J., dissenting)); Ziglar Pet. 33 (quoting App. 120a (Raggi, J., dissenting)). That is not the standard. This Court has emphasized that specific factual allegations cannot be ignored simply because "actual proof of those facts [seems] improbable," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), or even "extravagantly fanciful," *Iqbal*, 556 U.S. at 681, to the reviewing judge.

The problem in both *Twombly* and *Iqbal* was that the plaintiffs had failed to plead facts which would "ten[d] to exclude" an alternative "explanation for defendants'" conduct. *Twombly*, 550 U.S. at 552 (citation omitted). In *Iqbal*, the "obvious alternative explanation" the plaintiff had not excluded was a

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[9] Indeed, the DOJ Petitioners' specific decision to restrict Respondents' "ability to contact the outside world" (App. 275a (Compl. ¶ 61)), necessitated restrictive detention of the sort imposed in the ADMAX SHU. *See Mohammed v. Holder*, No. 07-cv-02697, 2011 U.S. Dist. LEXIS 111571, at *6, *20-21 (D. Colo. Sept. 29, 2011) (housing inmates in isolation so that other inmates cannot relay messages for them).

"nondiscriminatory intent to detain aliens who were illegally present in the United States and *who had potential connections to those who committed terrorist acts*." 556 U.S. at 682 (emphasis added). Here, by contrast, Respondents have pleaded facts excluding that explanation: their "well-pleaded allegations, in conjunction with the OIG Report's documentation of events such as the New York List," plausibly plead that the DOJ Petitioners "knew of, and approved, [Respondents'] confinement under severe conditions," "notwithstanding their knowledge that the government had *no evidence linking [Respondents] to terrorist activity*." App. 47a-48a (emphasis added).[10]

Petitioners respond that they intended only to prevent "dangerous individual[s]" from leaving the country. Ashcroft Pet. I, 30. Perhaps the evidence will bear that out. But the Federal Rules do not entitle Petitioners to dismissal simply because they disagree with the detailed allegations in the complaint. Respondents allege that Petitioners imposed on them an especially restrictive form of confinement knowing what those conditions were, (App. 274a-75a (Compl. ¶61)), and knowing that there was no reason to suspect them of terrorism, or anything else that might conceivably justify those constraints (App. 265a (Compl. ¶ 41)). In other words, the complaint specifically alleges that

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[10] It is misleading to say, as Petitioners do, that the court of appeals rejected Respondents' theory of liability and created its own. The list merger which the court of appeals emphasized has been part of Respondents' case since the Complaint was filed in 2010. *See* App. 267a-68a (Compl. ¶ 47).

Respondents were not, and Petitioners *knew* that they were not, "dangerous individual[s]."[11]

Petitioners also accuse the Second Circuit of imposing *respondeat superior* liability based on the discriminatory purpose of their subordinates. Ashcroft Pet. 30. Again, Petitioners simply have a factual disagreement with the pleadings and with the inferences that should be drawn. Few will readily admit to discriminatory or otherwise improper intent, so it is commonplace to resort to reasonable inferences at the pleading stage. It was certainly appropriate for the court of appeals to infer a discriminatory motive from Petitioners' own decision to knowingly subject detainees to unduly harsh treatment, knowing that the only reason for "suspecting" them was their race or religion. App. 39a, 63a-64a.

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[11] Though it is not relevant to these Petitions, Respondents do not agree that there is "no dispute . . . that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on anyone for whom the government had 'individualized suspicion of terrorism.'" Ashcroft Pet. 22 (citation omitted). Nor is this what the court of appeals held. Ashcroft Pet. 7 (citing App. 31a). Likewise, Respondents' detention under the immigration law for purpose of a criminal investigation, long after they could have been deported, was not "undisputedly lawful." Ashcroft Pet. 4. The Second Circuit found no clearly established right to avoid pretextual immigration detention; the constitutionality of the detentions was never determined. *See Turkmen v. Ashcroft*, 589 F.3d 542, 550 (2d Cir. 2009).

## III. Petitioners' Request For Qualified Immunity Does Not Warrant Review.

Petitioners seek this Court's review of their equally fact-bound claim of qualified immunity. In evaluating a claim of qualified immunity at the pleading stage, the alleged facts must be considered in the light most favorable to plaintiffs. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The question, therefore, is whether ordering the confinement of civil immigration detainees in highly restrictive conditions for months based on their race, religion, ethnicity or national origin alone, without any individualized basis to find them more dangerous than any ordinary civil detainee (or indeed, dangerous at all), is a violation of clearly established constitutional rights. Unless Petitioners would have this Court resurrect the discredited result of *Korematsu v. United States*, 323 U.S. 214 (1944), the answer is plainly yes.

This Court has, as Petitioners note, cautioned against defining the relevant right at "[too] high [a] level of generality," such as the "general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). But Petitioners make the opposite mistake, believing that "official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (Court need only find that "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he was doing violates that right"). Petitioners would have this

Court define the legal rights at issue so narrowly as to be virtually coterminous with the precise facts of the case.[12] At the same time, Petitioners' descriptions of the right at issue minimize or directly contradict the allegations in the complaint. Petitioner Ziglar, for example, frames the issue in distinctly Orwellian terms: whether he was entitled to subject to harsh treatment civil detainees "not *yet* linked to any terrorist activity." Ziglar Pet. 30 (emphasis added).

Few legal rules are as securely and precisely established as the prohibition on deprivations of rights motivated by race, religion, ethnicity or national origin. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). That rule is no less applicable in the prison and law enforcement contexts, and it demands that officers act on the basis of their suspicions of an individual, not a race or religion. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (racial classifications for penological purposes, such as controlling gang activity in prison, are subject to strict scrutiny); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (while law criminalizing illegal entry at the border permits stops based on

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[12] *See, e.g.*, Ashcroft Pet. 22-23 (arguing that the qualified immunity question is "whether all aliens on the New York List (each of whom has been legally arrested and detained in conjunction with the September 11 investigation) had a clearly established right to be immediately released from restrictive conditions of confinement merely because it came to light that, in some instances, arresting officers had failed to conduct the same initial vetting that detainees on the national INS list had received").

reasonable suspicion of alienage, law enforcement need "does not justify stopping all Mexican-Americans to ask if they are aliens"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race."); *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (state must have individualized, non-race-based reason for striking juror).

It is just as well-settled that prisoners have a substantive due process right to be free from "arbitrary or purposeless" conditions of confinement – that is, conditions not "reasonably related" to any "legitimate governmental objective." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). Prisons may have good cause to impose non-punitive "regulatory restraints" across the board, *id.* at 537, 558-60, but that does not allow federal officials to selectively apply harsh treatment on grounds of race or religion. In arguing that this principle was violated, Respondents do not resort to highly generalized and contested principles like "the history and purposes of the Fourth Amendment." *Al-Kidd*, 563 U.S. at 742 (citation omitted). They simply rely on the concrete framework set forth in *Wolfish*, and the even more fundamental proposition that classifications based on race, religion, ethnicity or national origin are presumptively unconstitutional.

Unable to dispute that holding an immigration detainee who poses no security risk in solitary confinement is clearly unconstitutional, Petitioners insist in vague terms that Respondents' detention

was not "divorced from security concerns." Ashcroft Pet. 25; *see also* Ziglar Pet. 31 (claiming that the issue is whether it was "plainly illegal to detain Respondents"). Petitioners go so far as to claim that it is not arbitrary to hold a civil immigration detainee in solitary confinement for months "*even 'in the absence of individualized suspicion of terrorist connections.*'" Ashcroft Pet. 23 (quoting App. 141a (Raggi, J., dissenting)) (emphasis added). The court of appeals had no trouble recognizing what Petitioners are reluctant to make explicit: such an argument "presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact." App. 45a; *cf. Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting) ("[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.").

Petitioners claim that they were justified in "err[ing] on the side of caution" in the wake of 9/11. Ashcroft Pet. 23 (citation omitted).[13] Perhaps they will be able to present evidence that they were merely being justifiably cautious, but "caution" does not justify what is alleged: that Petitioners *knowingly* subjected Respondents to mistreatment *without* having a basis for security concerns, save the clearly impermissible grounds of race or religion.

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[13] Notably, Ashcroft did not make a similar suggestion in *al-Kidd* – also a case arising from post-9/11 terrorism concerns.

This Court has rejected the notion that "the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *see also Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting) (courts "can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of [executive] policy"); *Patrolmen's Benevolent Ass'n. of City of N.Y. v. City of N.Y.*, 310 F.3d 43, 53-54 (2d Cir. 2002) ("[U]nconditional deference to a government agent's invocation of 'emergency' to justify a racial classification has a lamentable place in our history." (citing *Korematsu*, 323 U.S. at 223)). Petitioners' invitation for the Court to reexamine that fundamental rule-of-law premise should not be accepted.

## IV. The Court Should Not Decide This Case At An Early Stage Of Proceedings Without A Nine-Justice Court.

Apart from their unpersuasive claim of a circuit split on one of the three questions presented, Petitioners seek this Court's intervention simply because they disagree with the application of settled law to the facts of this case. That is not a request this Court ordinarily grants.

The subtext of the Petitions is not so much that the questions presented are sufficiently important to warrant review, but that *Petitioners themselves* are sufficiently important. Even if this Court agrees, it does not follow that it should grant review *now*. This Court often postpones review of important questions when they arise in an

"interlocutory posture." *See, e.g., Mt. Soledad Mem. Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting the denial of certiorari). The present case, despite long delays, is at the earliest such posture, denial of a motion to dismiss.

There are sound reasons for the Court to adhere to its cautious approach here. Much of Petitioners' argument, including its legal arguments for restricting *Bivens* liability, depends on their skepticism of Respondents' allegations. For example, this Court might assess Petitioners' plea for a "national security" exception to *Bivens* differently depending on whether they can show some non-racial or religious ground for their treatment of Respondents, or otherwise rebut the allegation that Petitioners knew there was no connection between Respondents and terrorism. Similarly, when this Court evaluates a claim of qualified immunity, "the result depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). Moreover, anything the Court says on these matters could well influence future officials' "incentives to abide by clearly established law," *Mitchell*, 472 U.S. at 524, including in future "extraordinary times" where "[l]iberty and security [must] be reconciled. . . within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). Prudence counsels providing such guidance on a fuller record.[14]

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[14] These considerations are not overcome by the general purpose of qualified immunity to "free officials from the concerns of litigation." Ashcroft Pet. 27 (quoting *Iqbal*, 556 U.S. (continued...)

Yet another reason for declining review at this early stage is that the Court might have to decide the case with an eight-Justice or even seven-Justice Court.[15] In light of the weighty issues implicating both this nation's security and its most core values, this Court should ensure that it can resolve such questions at a time and in a case where it is not short-handed. *Cf. Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1212 (2013) (Thomas, J., dissenting) (criticizing the "fraud on the market" presumption adopted by "four Justices of a six-Justice Court").

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at 685). Before any trial, Petitioners will have an opportunity to move for summary judgment, potentially leading to an appeal and a further opportunity to seek review in this Court. *See Johnson v. Jones*, 515 U.S. 304, 313 19 (1995) (legal issues concerning denial of summary judgment for party claiming qualified immunity are immediately appealable).

[15] Respondents briefly note an unusual aspect of this case. When the Second Circuit considered an earlier appeal in 2009, the panel originally included Justice Sotomayor, who was elevated to this Court and did not participate in the decision. *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009). None of the 2009 plaintiffs remain in the case today. By the time of the remand, the original six MDC Plaintiffs had either settled or withdrawn their claims; the amended complaint presented the claims of a separate group of MDC Plaintiffs who had not been involved in the Second Circuit proceeding. The Passaic Plaintiffs' claims have been dismissed and are not before this Court. *See* Ashcroft Pet. 2 n.1. Respondents' claims are based on a new complaint, and present essentially a distinct case from the original *Turkmen* case (and indeed could have been filed separately rather than as an amendment). Respondents offer no opinion on whether Justice Sotomayor should be recused under these circumstances, but provide this background in the event Justice Sotomayor considers it relevant.

## CONCLUSION

For the foregoing reasons, the petitions should be denied.

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NO. 15-1358

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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### I. THE COURT OF APPEALS IMPROPERLY EXTENDED THE BIVENS REMEDY

Looked at from a sufficiently high level of abstraction, a mouse shares the same "context" with an elephant: each is in the kingdom animalia, the phylum chordata, the subphylum vertebrata, and the

class mammalia. But no one seeking to determine whether these two animals truly share the same relevant "context" would analyze the situation at that level of abstraction: to do so would be to miss that relevant context entirely. In the same fashion, Respondents ask this Court to countenance the Panel Opinion's examination of context for purposes of implying a remedy under *Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), at a level of abstraction that is far too high.

Respondents' Brief in Opposition urges the same abstract and mechanistic approach to the *Bivens* issue that the Panel Opinion employed, focusing too narrowly on what the Panel Opinion called the "mechanism of injury" to analyze the *Bivens* claim in its proper context. Respondents strain to harmonize their wooden approach with this Court's decisions in *Chappell v. Wallace,* 462 U.S. 296 (1983), and *Minneci v. Pollard,* 132 S. Ct. 617 (2012). As to *Chappell,* they assert that it denied a remedy under *Bivens* because it involved a "novel mechanism of injury," that "mechanism" being "the military chain of command." Brief in Opposition, at 16.

But the "military chain of command" does not constitute a "mechanism of injury." The "mechanism" by which the defendants allegedly violated the plaintiffs' rights in *Chappell* consisted of straightforward employment discrimination on account of race. The plaintiffs there comprised five enlisted Navy men who sued several officers of the vessel on which they served. 462 U.S. at 297. Plaintiffs "alleged that because of their minority race [the officers] failed to assign them desirable duties,

threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." *Ibid.* That is *how* the *Chappell* plaintiffs alleged that the officers had injured their rights, the "mechanism of injury," as it were. It was this "mechanism" of employment discrimination on account of race that they alleged "deprived [them] of [their] rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude," and that stated a claim for "a conspiracy among [the officers] to deprive them of rights in violation of 42 U.S.C. § 1985." *Ibid.* (internal quotation marks and citation omitted).

*Chappell* denied the plaintiffs a remedy under *Bivens*, but not because the "mechanism of injury" was "novel." It was not: in *Davis v. Passman*, 442 U.S. 228 (1979), the Court had recognized a remedy under *Bivens* for a claim of employment discrimination against a government defendant (a Member of Congress). Indeed, the Court recognized that the "mechanism of injury" in *Chappell* was common in litigation in the civilian world, stating that it would analyze the issue before it as being whether to extend the *Bivens* " 'remedy to one sustaining "incident to [military] service" what under other circumstances would be an actionable wrong.' " 462 U.S. at 299 (quoting *Feres v. United States*, 340 U.S. 135, 138 (1950)). ("*Feres* guides our analysis" of whether to extend to members of the armed forces "the type of non-statutory damage remedy recognized in *Bivens*." *Ibid.*). Following *Feres*, the Court found that the overall context of the claim, injury sustained

"incident to military service," required it to deny a remedy under *Bivens* even though the "mechanism of injury," employment discrimination, "under other circumstances"—that is, in another context—"would be an actionable wrong." 462 U.S. at 299 (internal quotation marks omitted).

Respondents reach in the same way to distinguish *Minneci v. Pollard,* again arguing that the Court denied a *Bivens* remedy in that case because the "mechanism of injury" was "novel," this time because it "involve[d] private prison employee[s]." Brief in Opposition, at 16. The plaintiff in *Minneci* had claimed that the staff at the privately-operated prison where he was serving his sentence had injured his rights under the Eighth Amendment when they denied him adequate medical care. 132 S. Ct. at 620-621. That denial of medical care constituted the "mechanism" by which the defendants had allegedly injured the plaintiff's constitutional rights in that case. The private prison setting in which that mechanism allegedly did so constituted the "context" of the claim, and the Court examined that context in detail, *id.* at 623-626, in determining that it "cannot imply a *Bivens* remedy" in such a setting. *Id.* at 626.

Respondents' attempts to distinguish *Chappell* and *Minneci* demonstrate that their mechanical application of the test used by the Panel Opinion—identifying whether prior cases extending the *Bivens* remedy have recognized the same "rights injured" and the same "mechanism of injury"—does not work to determine whether a given *Bivens* claim arises in a "new context or [against a] new category of defendants," *Correctional Services Corp. v. Malesko,*

534 U.S. 61, 68 (2001), and so requires consideration of whether "special factors" counsel against judicial implication of the remedy.

Like the Panel Opinion, Respondents' Brief in Opposition invokes "mechanism of injury" as a sort of talisman to divert analysis from the totality of the circumstances, and thus from the determination whether there exist "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush v. Lucas*, 462 U.S. 367, 378 (1983). This Court's *Bivens* jurisprudence has eschewed such a narrow approach, and instead has looked broadly at the circumstances of each case to determine whether, taking into account all those circumstances, the *Bivens* claim has arisen in a new context. In taking the approach they have in this case, the Court of Appeals and Respondents have departed from this Court's *Bivens* jurisprudence.

Respondents also attempt to break down the context of this case into various factors, then examine each factor to conclude that it alone does not justify denying a *Bivens* remedy. Brief in Opposition, at 18-24 ("Immigration," "National Security," and "Policymak[ing]"). Analyzing each of these aspects of the context in isolation, Respondents argue that none of them alone suffices to show that the case arises in a new context.

For example, Respondents argue that the case does not involve immigration matters, but only "their mistreatment in custody, which had nothing to do with their immigration proceedings." *Id.* at 18. That views the context of this case with blinkers. Challenging Mr. Ziglar's actions in performing those duties surely implicates the manner in which the

Executive Branch carries out its responsibilities in enforcing the administering the immigration laws, including how it does so in a national emergency, a context where courts have deferred to the Executive Branch in large measure.

So, too, do the alleged actions of the DOJ Defendants at issue in this case implicate national security. Mr. Ziglar, like Mr. Ashcroft and Mr. Mueller, took the actions Respondents attribute to him in the context of discharging his responsibilities to keep the Nation safe in the immediate aftermath of 9/11. Respondents' argument regarding national security does not use blinkers: it wears a blindfold.

## II. *IQBAL* REQUIRES DISMISSAL OF RESPONDENTS' FOURTH AMENDED COMPLAINT

Nothing in Respondents' Fourth Amended Complaint plausibly alleges that Mr. Ziglar (or the other DOJ Defendants) knew that the FBI's New York list was over-inclusive, or intended that any Respondent be held in restrictive conditions, or even knew about the conditions of confinement at the Metropolitan Detention Center.

But even assuming the Fourth Amended Complaint could be read to plausibly allege these matters, it cannot be read as plausibly alleging that it was more likely that Mr. Ziglar acted because of, and not in spite of, some discriminatory purpose. The factual averments of the Fourth Amended Complaint are, to say the least, consistent with an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (internal quotation marks omitted), namely that whatever he is alleged to have done, Mr. Ziglar acted out of concern that persons illegally in the United

States who had been lawfully arrested and detained in the 9/11 terrorist investigations, and "who had potential connections to those who committed terrorist acts," *ibid.*, could leave the country or engage in activities in furtherance of terrorist objectives if not detained in restrictive conditions until cleared. *Iqbal* so held on facts indistinguishable from those in this case, and the Court of Appeals erred in not following *Iqbal* here.

Respondents' Brief in Opposition concedes that *Iqbal* would require that Respondents' claims against the DOJ Defendants be dismissed, but for a solitary saving grace: Respondents argue that their latest pleading escapes the *Iqbal* fate solely because Respondents have added one additional factual averment, that is, the allegation that the DOJ Defendants " 'knew of and approved, [Respondents'] confinement under severe conditions' " even though those defendants also knew that " 'the government had no evidence linking [Respondents] to terrorist activity.' " Brief in Opposition, at 28 (quoting Panel Opinion, Pet. App. at 47a-48a (emphasis omitted)).[1]

Respondents recognize that "[t]he problem in both [*Bell Atlantic Corp. v.*] *Twombly* [, 550 U.S. 544 (2007),] and *Iqbal* was that the plaintiffs had failed

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[1] Respondents' Brief in Opposition cited to the Appendix To the Petition For A Writ Of Certiorari that Mr. Ashcroft and Mr. Mueller filed with their joint Petition For A Writ Of Certiorari in No. 15-1359. This Reply's citations to the Appendix refer to that same source.

to plead facts that would 'ten[d] to exclude' an alternative 'explanation for defendants' ' conduct." Brief in Opposition, at 27 (quoting *Twombly*, 550 U.S. at 552 (citation omitted by quoting brief)). Respondents also recognize that "[i]n *Iqbal*, the 'obvious alternative explanation' the plaintiff had not excluded was a 'nondiscriminatory intent to detain aliens who were illegally present in the United States and *who had potential connections to those who committed terrorist acts*.' " *Id.* at 27-28 (quoting *Iqbal*, 556 U.S. at 682 (emphasis added by quoting brief)).

Respondents claim their Fourth Amended Complaint has supplied what the *Iqbal* pleading lacked, that is, an allegation of "facts excluding that [obvious alternative] explanation." *Ibid.* They say this new saving allegation consists of the averment that Mr. Ziglar and the DOJ Defendants knew of and approved the confinement of Respondents under restrictive conditions despite " 'their knowledge that the government had *no evidence linking [Respondents] to terrorist activity*.' " *Id.* at 28 (quoting Panel Opinion, Pet. App. at 48a (emphasis added by quoting brief)).

Respondents' attempt to distinguish *Iqbal* thus rests on the premise that this single new allegation excludes the "obvious alternative explanation" that sank the pleading in *Iqbal*, that those defendants acted, not for discriminatory reasons, but to detain aliens illegally present in the United States " '*who had potential connections to those who committed terrorist acts*.' " *Id.* at 28 (quoting *Iqbal*, 556 U.S. at 682 (emphasis added by quoting brief)).

But *Iqbal* did not identify the "obvious alternative explanation" as being that the DOJ Defendants acted to detain only aliens as to whom " 'the government had . . . *evidence linking [them] to terrorist activity.*' " *Id.* at 28 (quoting Panel Opinion, Pet. App. at 48a (emphasis added by quoting brief)). This Court in *Iqbal* said something materially different: it characterized that "obvious alternative explanation" as a "nondiscriminatory intent to detain aliens illegally present in the United States and ***who had potential connections to those who committed terrorist acts***," *Iqbal*, 556 U.S. at 682 (emphasis added). That is not the same as requiring that the government have "evidence" in hand that "links" the detainees themselves "to terrorist activity."

The "alternative explanation" here is as "obvious" as it was in *Iqbal*. Even with knowledge that the government had no "evidence" linking Respondents themselves "to terrorist activity," it is just as likely that the DOJ Defendants here acted because Respondents—aliens illegally in the United States who had come to this country from the same geographical area and who had the same cultural background as the 9/11 terrorists, each of whom had been lawfully arrested on probable cause as part of the 9/11 investigations—also had the same "potential connections to those who committed terrorist acts" that this Court in *Iqbal* found sufficient to provide a nondiscriminatory basis for the detention there at issue.

As Judge Raggi's dissent observed, "the discrimination allegations [that *Iqbal*] deemed implausible in light of the more likely national security explanation for defendants' actions included

assertions that the MDC Plaintiffs' restrictive confinement was not supported by 'any individual determination' that such restrictions were 'appropriate or should continue.' " Pet. App. at 155a (quoting *Iqbal* First Amended Complaint ¶ 97). For this reason, the dissent concluded, it could not be suggested that the Court in *Iqbal* "did not understand that plaintiffs were complaining of the lack of prior individualized suspicion," exactly as Respondents do here. *Ibid.*

*Iqbal* makes that clear. As in this case, the plaintiff's complaint in *Iqbal* "challenge[d] neither the constitutionality of his arrest nor his initial detention in the MDC." 556 U.S. at 682. As in this case, in *Iqbal* the plaintiff complained only that he had been discriminated against by being placed in the most restrictive conditions of confinement because of his race, religion, or natural origin. *Ibid.* His "only factual allegation against [Mr. Ashcroft and Mr. Mueller] accuse[d] them of adopting a policy approving restrictive conditions of confinement for post-September-11 detainees until they were 'cleared' by the FBI." *Id.* at 683 (internal quotation marks omitted). And the "restrictive conditions" Mr. Iqbal alleged are the same as those Respondents here allege. *Id.* at 668.

Nothing in *Iqbal* suggests that when it subjected Mr. Iqbal to restrictive confinement " 'the government had [any] evidence linking [Mr. Iqbal] to terrorist activity.' " Brief in Opposition, at 28 (quoting Panel Opinion, Pet. App. at 48a) (emphasis omitted). To the contrary: this Court's opinion makes it clear that Mr. Iqbal had alleged that the government held him in " 'harsh conditions of confinement as a

matter of policy, ***solely*** on account of [his] religion, race, and/or national origin and ***for no legitimate penological interest.***" 556 U.S. at 669 (internal quotation marks omitted) (emphasis added).

*Iqbal* held that while these allegations were consistent with purposeful discrimination, there existed an alternative explanation that rendered this claim of discriminatory purpose implausible. It found that the acts of Mr. Ashcroft and Mr. Mueller in *Iqbal* "were likely lawful and justified by [their] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682. For that reason, this Court held that "discrimination [was] not a plausible conclusion." *Ibid.*

Nor is it a plausible conclusion here, and for the same reasons as in *Iqbal.*

## III. THE COURT OF APPEALS IMPROPERLY DENIED MR. ZIGLAR QUALIFIED IMMUNITY

As it did in addressing the *Bivens* issue, Respondents' Brief in Opposition tries to characterize the rights they contend were clearly established for qualified immunity purposes as abstractly as possible. They identify those rights as the right to be free from "deprivations of rights motivated by race, religion, ethnicity, or national origin," Brief in Opposition, at 31, and the "substantive due process right to be free from arbitrary or purposeless conditions of confinement—that is, conditions not reasonably related to any legitimate governmental objective." *Id.* at 32 (internal quotation marks omitted).

Respondents sail too far above the facts of this case. They ignore "the *particular* conduct" of Mr. Ziglar (and the other DOJ Defendants) "in light of the *specific* context of this case." Pet. App. at 247a (emphasis in original). Here, just as in *Iqbal,* the "particular conduct" and the "specific context" sharpen the focus regarding qualified immunity: did Respondents have a clearly-established right to be free from restrictive confinement when they were in the United States illegally, the government had lawfully arrested and detained them in the course of its investigation of the terrorist attacks of 9/11, they shared many traits with the 9/11 terrorists (such as country of origin, religious affiliation, and cultural background), and they "***had potential connections to those who committed terrorist acts***"? *Iqbal,* 556 U.S. at 682 (emphasis added).

When the enquiry is phrased this way, as it should be, it cannot be said that Respondents had a clearly-established right to be free from restrictive confinement such that only "the plainly incompetent or those who knowingly violate the law" would have so confined them. *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Respondents' Brief in Opposition cites no case law that comes close to establishing the unlawfulness of Mr. Ziglar's alleged conduct. He is entitled to qualified immunity.

Nor should this Court defer resolution of this issue, as Respondents suggest. Brief in Opposition, at 35 (quoting *Brosseau v. Haugen,* 543 U.S. 194, 201 (2004)). The Court there did not question its holdings in cases such as *Saucier v. Katz,* 533 U.S. 194 (2001), that "[q]ualified immunity is an entitlement not to stand trial or face the other

burdens of litigation," constitutes "an *immunity from suit* rather than a mere defense to liability," and should be resolved "at the earliest possible stage in litigation." *Id.* at 200-201 (internal quotation marks and citations omitted) (emphasis in original). Respondents have pointed to no facts that justify a departure from those precedents in this case. If Mr. Ziglar is entitled to qualified immunity, he is entitled to it now, so he may avoid the burdens of this litigation.

## CONCLUSION

Petitioner, James W. Ziglar, respectfully requests that the Court grant his Petition For A Writ Of Certiorari to review the judgment of the United States Court of Appeals For The Second Circuit in this matter.

Respectfully Submitted,

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RECORD
AND
BRIEFS

Nos. 15-1359, 15-1358, 15-1363

IN THE

# Supreme Court of the United States

JOHN D. ASHCROFT, former U.S. Attorney General, and ROBERT MUELLER, former Director of the FBI,
*Petitioners,*

v.

IBRAHIM TURKMEN, *et al.*,
*Respondents.*

**(Caption continued on inside cover)**

**On Petitions for Writs of Certiorari to the U.S. Court of Appeals for the Second Circuit**

## BRIEF OF FORMER U.S. ATTORNEYS GENERAL WILLIAM P. BARR, ALBERTO R. GONZALES, EDWIN MEESE III, MICHAEL B. MUKASEY, AND DICK THORNBURGH; FORMER FBI DIRECTORS WILLIAM S. SESSIONS AND WILLIAM H. WEBSTER; AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**No. 15-1358**

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JAMES W. ZIGLAR,

*Petitioner*,

v.

IBRAHIM TURKMEN, *et al.*,

*Respondents*.

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**No. 15-1363**

---

DENNIS HASTY and JAMES SHERMAN,

*Petitioners*,

v.

IBRAHIM TURKMEN, *et al.*,

*Respondents*.

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## QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General, former Director of the Federal Bureau of Investigation (FBI), and other senior federal government officials personally liable for policy decisions made about national security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether those senior officials are entitled to qualified immunity for their alleged role in the treatment of Respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether Respondents' allegations that those senior officials personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanations—that the actions of the senior Justice Department officials were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States, and that the actions of the heads of the Metropolitan Detention Center were motivated by a desire to comply with the FBI's terrorism designations.

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## INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General, two former Directors of the FBI, and a public-interest law firm.[1] *Amici* believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. *Amici* are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims. *Amici* are also concerned that the decision below inappropriately expands judicially inferred damages remedies against federal officials for alleged violations of constitutional rights, and it adopts a standard for what constitutes a "plausible" claim for relief that is far broader than the one established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

The Honorable Alberto R. Gonzales served as Attorney General of the United States from 2005 to 2007. He also served as White House Counsel to President George W. Bush from 2001 to 2005 and as a Justice on the Texas Supreme Court from 1999 to 2001.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable William S. Sessions served as Director of the FBI from 1987 to 1993. He also served as a judge on the U.S. District Court for the Western District of Texas from 1974 to 1987, serving as Chief Judge from 1980 to 1987; and was the United States Attorney for the Western District of Texas from 1971 to 1974.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Honorable William H. Webster served as Director of the FBI from 1978 to 1987. He also served as Director of the CIA from 1987 to 1991. He served as a judge on the U.S. District Court for the Eastern

District of Missouri from 1970 to 1973, and on the U. S. Court of Appeals for the Eighth Circuit from 1973 to 1978.

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center. It regularly appears in this and other federal courts to support appropriate enforcement of pleading standards in civil litigation.

## STATEMENT OF THE CASE

Petitioners in Nos. 15-1358 and 15-1359 are high-ranking federal officials who played a prominent role in directing the Government's investigation into the events of September 11, 2001, when al Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Respondents are six aliens who were arrested for immigration violations and were detained in connection with that investigation, under highly restrictive conditions at the Metropolitan Detention Center (MDC) in Brooklyn.[2] They contend that the conditions of their detention violated their Fifth Amendment rights to substantive due process and equal protection of the laws.

Respondents allege that U.S. Attorney General

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[2] In using the term "Respondents," *amici* refer only to those six men. Two other plaintiffs/respondents—Ibrahim Turkmen and Akhil Sachdeva—were not detained at the MDC. The Second Circuit dismissed their claims, and they have not petitioned the Court for review of that dismissal. Petitioners in No. 15-1363 are the former Warden and Associate Warden at the MDC.

John Ashcroft and FBI Director Robert Mueller (Petitioners in No. 15-1359) actively supervised the 9/11 investigation. They allege that Ashcroft and Mueller developed a policy whereby the federal government would arrest any Arab or Muslim man who, while being questioned in connection with the investigation, was determined to be in the country in violation of immigration laws. Pet. App. 245a. They further allege that Petitioners established a "hold-until-cleared" policy, whereby aliens being detained because they were deemed "of interest" or "of high interest" to the investigation were not to be released until the FBI affirmatively cleared them of terrorist ties. *Id.* at 245a-246a. Ultimately, the Immigration and Naturalization Service (INS) placed 762 detainees on its Custody List (the "INS List"); those individuals were thereby made subject to the hold-until-cleared policy. *Id.* at 9a.

Bureau of Prisons (BOP) policy required that those classified as "of interest" or "of high interest" were to be confined "in the most restrictive and secure conditions permitted by BOP policy." *Id.* at 49a. At the MDC, that meant detention in the facility's Administrative Maximum Special Housing Unit ("ADMAX SHU"), a unit in which the conditions of confinement were quite harsh. Respondents do not contend however, that the confinement policies adopted for the ADMAX SHU violated either BOP policy or the U.S. Constitution. Respondents each were confined in ADMAX SHU for several months before being cleared of involvement in terrorism and deported. Respondents were among 84 individuals housed in ADMAX SHU during 2001-02. The great majority of individuals detained due to their "of interest" or "of

high interest" status were detained at non-federal facilities (such as the Passaic County Jail), where their conditions of confinement were far less harsh.

The Fourth Amended Complaint alleges that Petitioners violated Respondents' substantive due process rights by subjecting them to punitive conditions of confinement that allegedly served no valid governmental purpose. Although acknowledging that those conditions might have served a valid purpose if Petitioners had had reason to believe that the detainees were terrorists, Respondents allege that all Petitioners were aware that, for many of the aliens designated "of interest" or "of high interest," the government lacked any evidence plausibly connecting them to terrorism. Petitioners are alleged to have violated Respondents' equal protection rights by singling them out for harsh treatment based on their race, religion, and/or ethnic or national origin. *Id.* at 335a.

The district court granted motions to dismiss filed by Ashcroft, Mueller, and INS Commissioner James Ziglar, the Petitioner in No. 15-1358 (the "DOJ Petitioners"). The court concluded that the complaint did not plausibly allege punitive intent, Pet. App. 189a, nor did it plausibly allege that they "directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a. The court largely denied motions to dismiss filed by the MDC-based defendants. *Id.* at 190a-194a, 200a-202a, 219a-220a; 224a-225a. They filed an interlocutory appeal from the denial of their assertion of qualified immunity. Respondents appealed dismissal of claims against the DOJ Petitioners.

A divided Second Circuit reinstated the substantive due process and equal protection claims against the DOJ Petitioners and largely affirmed denial of the MDC Petitioners' motion to dismiss. Pet. App. 1a-156a. The appeals court initially concluded that a *Bivens* remedy was available for each of Respondents' Fifth Amendment claims. *Id.* at 21a-29a. It held that Respondents' status as unauthorized aliens and the national security context of their detention was irrelevant to the *Bivens* analysis.

The appeals court also rejected Petitioners' assertion of qualified immunity. *Id.* at 46a-47a, 55a-57a, 71a-72a, 80a-81a. The court concluded that federal case law as of 2001 clearly established that Petitioners' alleged conduct violated Respondents' constitutional rights.

The appeals court also concluded that the complaint adequately stated claims against all Petitioners. The Court recognized that the DOJ Petitioners did not create the allegedly punitive confinement conditions in question. *Id.* at 30a. It nonetheless held that they could be charged with responsibility for those conditions, because the complaint alleged that: (1) they were aware that the New York office of the FBI had designated many Arab/Muslim detainees as "of interest" or "of high interest" despite lacking any credible evidence of their ties to terrorism; and (2) they approved merging the New York FBI's list of detainees (the "New York List") with the INS List, thereby ensuring application of the hold-until-cleared policy to Arab/Muslim detainees whom they knew could not plausibly be tied to terrorism. Pet. App. 30a-46a, 59a-65a.

The MDC Petitioners similarly asserted that the complaint failed to state a claim against them for constitutional violations, arguing that the most plausible inference to be drawn from the complaint's allegations is that they placed the six Respondents in the ADMAX SHU not for punitive or discriminatory purposes (as alleged by Respondents) but because BOP policy required them to do so. The Second Circuit rejected that assertion, noting that the complaint alleged that the MDC Petitioners eventually learned that the FBI was designating Arab/Muslim men as "of interest" and "of high interest" without any evidence of ties to terrorism. *Id.* at 48a-52a. The court concluded that the complaint adequately alleged claims against the MDC Petitioners by alleging that they continued to abide by the FBI's detainee classifications even after learning that those classifications lacked evidentiary support. *Ibid.*

Judge Raggi dissented. Pet. App. 83a-156a. She asserted that the courts should not recognize the claimed *Bivens* remedies against federal officials, when the claimed remedies challenge official "national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country." *Id.* at 84a. Under those circumstances, she concluded, "Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages." *Ibid.*

She also concluded that Petitioners were entitled to qualified immunity. *Id.* at 84a-85a. She explained:

> The law did not [in 2001-02] clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not sure that conclusion is clearly established even today.

*Id.* at 85a.

Judge Raggi also concluded that the complaint failed to adequately allege discriminatory treatment, stating that the complaint failed to allege facts from which one could reasonably infer that Petitioners acted "because of, not merely in spite of, the action's adverse effects" on Arabs/Muslims. *Id.* at 130a (quoting *Iqbal*, 556 U.S. at 681); *see also id.* at 142a-144a. She asserted, for example, that the complaint provides no factual basis for inferring that anyone decided to merge the New York List with the INS List "*because* it would keep [Respondents] in restrictive confinement." *Ibid.* Nor could the actions of the MDC Petitioners "plausibly imply discriminatory intent because they are obviously and most likely explained by reliance on the FBI's designations of each [Respondent] as a person 'of high interest,' or 'of interest,' to the ongoing terrorist investigation." *Id.* at 151a.

An equally divided Second Circuit denied rehearing *en banc*. Pet. App. 227a-240a. Judge Jacobs issued an opinion dissenting from the denial, joined by Judges Cabranes, Raggi, Hall, Livingston, and Droney. *Id.* at 231a-240a.

## SUMMARY OF ARGUMENT

The petitions raise issues of exceptional importance. *Amici* urge the Court to grant review of all three Questions Presented. We write separately to focus particular emphasis on the qualified immunity question. Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct.

In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* are concerned by the disruptive effects of such discovery, and they are very concerned that such disruptions are likely to impair the ability of high-level officials to carry out their missions

effectively. Review is warranted to determine whether such disruptions are required under the terms of the qualified immunity doctrine and the pleading standards established by the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.

Respondents raise constitutional claims that are largely the same as those at issue in *Iqbal* and that arise from precisely the same underlying facts: the detention of Arab/Muslim unauthorized aliens at the MDC under harsh conditions in 2001-02. *Iqbal* determined that the complaint at issue there did not adequately state a constitutional claim against Ashcroft and Mueller for their alleged role in the detentions. The Second Circuit decision, by reaching the opposite conclusion in connection with a complaint that added little in the way of new factual allegations, is in considerable tension with *Iqbal*. The same considerations that led the Court to review (and ultimately overturn) the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should persuade the Court to grant review here as well. In particular, Respondents' complaint includes no factual allegations from which one can reasonably infer that Ashcroft, Mueller, and Ziglar played any role in determining the conditions of Respondents' confinement.

Review is also warranted to determine whether the courts should recognize a judicially inferred damages remedy against senior Executive Branch officials for alleged infringement of Respondents' constitutional rights in the course of carrying out their national security responsibilities. As Petitioners note,

the appeals courts are sharply divided on the issue, with the Fourth, Seventh, Ninth, and D.C. Circuits issuing decisions that conflict with the decision below. Review is warranted to resolve that conflict.

*Amici* also write separately to note that the Second Circuit's unprecedented recognition of *Bivens* actions to challenge Executive Branch national security policy conflicts with decisions of this Court. The Court has cautioned against recognition of new *Bivens* remedies when, as here, "special factors" counsel hesitation. Those special factors include the national security and immigration-law aspects of this case (areas in which courts traditionally defer to the judgments of the elected branches), the availability of alternative remedies (*e.g.*, *habeas corpus* proceedings), and the failure of Congress to provide an express damages remedy despite its considerable focus on detention-related issues arising in the course of the 9/11 investigation.

## REASONS FOR GRANTING THE PETITION

### I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO AVOID THE BURDENS OF LITIGATION IMPOSED BY INSUBSTANTIAL CLAIMS

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

*Harlow v. Fitzgerald*, 457 U.S. 800, 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated

> with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety.

*Mitchell*, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

Events proved Justice Stevens's prescience. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding national security matters proliferated throughout the administrations of Presidents Barack Obama, George W. Bush, and Bill Clinton. *See, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (suit against Defense Secretaries Leon Panetta and Donald Rumsfeld alleging mistreatment of military detainee); *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011) (suit against Attorney General alleging improper authorization of material-witness warrants to detain terrorism suspects); *Gonzalez v. Reno*, 325 F.2d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez).

### A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

In an effort to reduce the burdens imposed by such suits, the Court has crafted a qualified immunity

doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Mitchell*, 472 U.S. at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "insubstantial claims [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). *Amici* submit that review of the second prong—whether the asserted right was "clearly established"—is particularly warranted in this case.

### B. Under the Second Circuit's Ruling, Virtually Every Alleged Violation Will Be Deemed "Clearly Established"

The Second Circuit pointed to no pre-2001 decision whose holding directly supported its conclusion: that substantive due process prohibited federal officials from confining lawfully arrested unauthorized aliens in harsh conditions while investigating their possible involvement in terrorism.[3] Instead, it merely cited *Bell v. Wolfish*, 441 U.S. 520 (1979), for the more general proposition that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a. But that assertion begs the question: can the imposition of restrictive conditions of confinement on unauthorized aliens serve a "legitimate governmental objective?" In 2001-02, federal officials concluded that imposing harsh conditions could serve such objectives, by assisting in the federal government's response to a national-security crisis. In the absence of pre-2001 case law holding otherwise, Petitioners are entitled to good-faith immunity from damages claims challenging that conclusion.

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[3] The Second Circuit did not contest that the harsh conditions adopted at the MDC could, in appropriate circumstances, be imposed on convicted felons. Nor did it contest that federal immigration officials were entitled to detain Respondents and other unauthorized aliens under generally authorized prison conditions.

The Second Circuit's contrary conclusion sharply conflicts with this Court's qualified immunity case law. The Court has repeatedly explained that "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. ... Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305 (2015). Perhaps the best evidence that the substantive due process right asserted by Respondents was not "clearly established" is the Second Circuit's 6-6 vote denying rehearing *en banc* in this case. That half the judges on the Second Circuit concluded that Petitioners' alleged conduct did not violate the Due Process Clause is convincing evidence that the contrary view was not "clearly established."

The Second Circuit erred by examining the due process issue at too high a level of generality. This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality. ... The general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Al-Kidd*, 563 U.S. at 742. Similarly, the general proposition that the Due Process Clause prohibits the imposition of punishment on pre-trial detainees that serves no legitimate government objective is of little help in determining whether it was "clearly established" that the harsh conditions of confinement at issue here served no legitimate objective.

As the D.C. Circuit has pointed out:

> It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

*Int'l Action Ctr. v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). Review is warranted to determine whether federal officials in 2001, based on then-existing case law, could reasonably have anticipated that their decision to impose harsh conditions of confinement on unauthorized aliens (as a means of securing information about terrorist activity) would give rise to liability for damages.

Review is also warranted to resolve the conflict between the decision below and the Fourth Circuit's grant of qualified immunity in a case arising in a similar national-security context. The Fourth Circuit held that qualified immunity barred a military detainee's damages claim against senior defense officials based on allegations that the conditions of his confinement unlawfully interfered with the free exercise of his religion (Islam). *Lebron*, 670 F.3d at 560. The Fourth Circuit held that the context in which a claim arises is crucial in determining whether the right to relief is "clearly established"—and thus whether the defendants are entitled to qualified

immunity. It held that free-exercise rights of the sort claimed by the plaintiff are not clearly established when they arise within a national-security context, even though those same rights are clearly established in a civilian context. *Ibid.* In sharp contrast, the Second Circuit based its "clearly established" determination on case law (*Bell v. Wolfish*) arising outside the context of immigration and national security, concluding that the immigration/national security context within which this case arose did not alter the qualified-immunity analysis.

## II. THE DECISION BELOW CONFLICTS WITH THE PLEADING STANDARDS ARTICULATED BY *IQBAL* AND WITH OTHER CIRCUITS' UNDERSTANDINGS OF *IQBAL*

Fed.R.Civ.P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated earlier requirements that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007).

*Twombly* held that Rule 8(a)(2) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id.* at 556. It held that requiring plausibility "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 557. The Court explained that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations are merely possible or conceivable. *Id.* at 557, 570.

*Iqbal* applied the Rule 8 pleading standards to claims substantially identical to those raised by Respondents. The plaintiff in *Iqbal* (a citizen of Pakistan arrested following 9/11 for violating immigration laws) sued Ashcroft, Mueller, and other federal officials for the harsh conditions he endured while incarcerated in ADMAX SHU. Reversing the Second Circuit, this Court determined that Iqbal had inadequately pleaded that Ashcroft and Mueller violated his Fifth Amendment rights to substantive due process and equal protection. *Iqbal*, 556 U.S. at 682-83. The Court concluded that although Iqbal claimed that they adopted a policy of detaining individuals in ADMAX SHU "because of their race, religion, or national origin," his *factual* allegations were insufficient to state a plausible discrimination claim. *Ibid.* The Court rejected his assertion that one could infer intentional discrimination from DOJ's hold-until-cleared policy, stating, "All it plausibly suggests is that

the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

Review is warranted to resolve the considerable tension between *Iqbal* and the decision below. The same considerations that led the Court to review (and ultimately overturn) the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should persuade the Court to grant review here as well.

In concluding that Respondents satisfied the Rule 8 pleading standard, the Second Circuit focused primarily on a single factual allegation on which *Iqbal* had not focused: the decision of DOJ officials to merge the New York List with the INS List. The appeals court concluded that the merger decision ensured prolonged detention for those on the New York List because they would thereafter be subjected to DOJ's hold-until-cleared policy. Pet. App. 37a-42a, 59a-62a. It concluded that one could plausibly infer discriminatory intent (as well as an intent to punish without any legitimate governmental objective) from the DOJ Petitioners' approval of the merger because they were aware that: (1) the FBI's New York office had placed many individuals on the New York List despite lacking evidence connecting them to terrorism; and (2) the merger could result in those individuals' being subjected to harsh conditions of confinement for a prolonged period. *Ibid.*

The merging of the two lists will not bear the weight the Second Circuit assigns to it, even putting

aside the substantial evidence (catalogued by Judge Raggi in her dissent) that Ashcroft, Mueller, and Ziglar played no role in the merger decision. Even if one assumes that they were aware that some Arab/Muslim men would suffer prolonged detention in ADMAX SHU as a result of merging the lists, the Court has repeatedly cautioned that intentionally invidious discrimination is not demonstrated by showing that a defendant is aware that members of a specific religious or ethnic group will be adversely affected by a challenged decision. As the Court explained in concluding that Iqbal had inadequately alleged intentional discrimination by Ashcroft and Mueller on the basis of race, religion, or national origin:

> Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effect on an identifiable group. It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

*Iqbal*, 556 U.S. at 676-77 (citations omitted).

By far the most plausible inference one can draw from the decision to merge the lists is that federal officials sought to ensure a thorough review of all potential suspects, thereby minimizing the possibility that terrorists could slip through the cracks. Petitioners may have been aware, of course, that their decision would result in some Arab/Muslim unauthorized aliens enduring prolonged detention. But while Respondents allege that Petitioners knew that some of those on the New York List were not plausible suspects, there is no allegation that they had any short-term means of distinguishing such individuals from others who really were associated with terrorist activity. The only means of doing so without risking the release of dangerous individuals was to mandate a thorough review of all those on the New York List—a review that was facilitated by merging the two lists. Because this better-safe-than-sorry rationale is a far more plausible explanation of Petitioners' conduct than is the Second Circuit's intentional-discrimination theory, the factual allegations of Respondents' complaint are insufficient to state a claim for intentional racial, religious, or national-origin discrimination.[4]

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[4] The Second Circuit's intentional-discrimination inference is further undercut by the fact that a significant majority of Arab/Muslim males on the FBI List were incarcerated at the Passaic County Jail or other non-federal facilities and thus were not subjected to the harsh conditions experienced by those assigned to the MDC. Pet. App. 147a-148a. It is not plausible to suggest that the DOJ Petitioners intended to discriminate against Respondents *because of* their race, religion, or national origin when a large percentage of similarly situated Arab/Muslim detainees were not subjected to similarly harsh conditions.

The complaint's factual allegations with respect to the MDC Petitioners are similarly deficient. In upholding the discrimination claim against the MDC Petitioners, the Second Circuit pointed to allegations that they eventually learned that the FBI was designating Arab/Muslim men as "of interest" and "of high interest" without any evidence that they had ties to terrorism. But even if they thus became aware that the detention policy was having a disparate impact on Arab/Muslim men, one cannot plausible infer from those allegations that they continued to hold such men in ADMAX SHU *because* they intended to discriminate against Arab/Muslim men. Rather, by far the most plausible inference is that they did so because they were required to do so under BOP Policy.[5]

Review of the Rule 8 issue is also warranted because the Second Circuit's interpretation of *Iqbal* is inconsistent with that of other circuits. *See, e.g., Moss v. U.S. Secret Service*, 572 F.3d 962, 970-72 (9th Cir. 2009) (*Iqbal* required dismissal of First Amendment discrimination claim where plaintiffs' allegations demonstrated only that the defendants were aware of

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[5] The Second Circuit's rationale could have serious negative impacts on national security. The implication of the appeals court's decision is that once the MDC Petitioners became convinced that there was little credible evidence of terrorist ties for some of the unauthorized aliens designated as "of interest" or "of high interest" by the FBI, they should have deliberately disobeyed BOP Policy and removed those individuals from the ADMAX SHU. *Amici* respectfully submit that it is wholly inappropriate for federal courts to interfere with the Executive Branch chain of command in that manner, interference that could potentially disrupt the ability of senior officials to direct subordinates in responding to national-security threats.

disparate impact); *Guirguis v. Movers Specialty Services, Inc.*, 346 Fed. Appx. 774 (3d Cir. 2009) (dismissal of complaint alleging national-origin discrimination in employment affirmed on the basis of *Iqbal*, where plaintiff alleged that defendant fired him because of his Egyptian nationality but included no factual allegations that supported an inference of intentional discrimination).

## III. THE SECOND CIRCUIT'S DECISION TO RECOGNIZE A JUDICIALLY INFERRED DAMAGES REMEDY FOR RESPONDENTS' CONSTITUTIONAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT

As Petitioners have ably demonstrated, the federal appeals courts are sharply divided on the issue of whether federal courts, without awaiting express authority from Congress, should infer a damages remedy for Respondents' constitutional claims. *Amici* concur that the Court should grant review on this issue as well, in order to resolve the conflict.

*Amici* write separately to note that the Second Circuit's unprecedented recognition of a *Bivens* action to challenge Executive Branch national security policy also conflicts with decisions of this Court. The Court's authority to recognize a new constitutional tort is anchored in its general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, the Court has exercised that authority only sparingly. *Bivens* (decided in 1971) marked the first time that the Court did so. It has done so on only two other occasions (most recently in 1980), and since then has "consistently

refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

The reluctance to extend *Bivens* is grounded in separation-of-powers concerns. Deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy sought, but on who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). The answer is generally Congress, because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act in the public's behalf." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

The Court's *Bivens* case law suggests that it is particularly appropriate to permit Congress, rather than the courts, to decide whether to recognize a right of action for Respondents' constitutional claims. Those claims implicate important national security issues. As the Court has repeatedly recognized, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Congress may ultimately determine that a damages remedy would provide an appropriate check against overly harsh treatment of unauthorized aliens who are properly subject to detention and are being investigated for possible connection to terrorism. But Congress has not done so to date, despite its adoption of numerous post-9/11 statutes addressing detention policy. Review is warranted to determine whether the Second Circuit overstepped judicial bounds by recognizing Respondents' right to assert their

constitutional claims.

## CONCLUSION

The Court should grant the Petitions.

Respectfully submitted,

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Nos. 15-1358, 15-1359, and 15-1363

# In the Supreme Court of the United States

JAMES W. ZIGLAR, PETITIONER

*v.*

AHMER IQBAL ABBASI, ET AL.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS

*v.*

AHMER IQBAL ABBASI, ET AL.

DENNIS HASTY, ET AL., PETITIONERS

*v.*

AHMER IQBAL ABBASI, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket Nos. 13-981, 13-999, 13-1002, 13-1003, and 13-1662

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

*v.*

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY, DEFENDANTS-APPELLANTS

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-CROSS-APPELLEES

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN, JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT, DEFENDANTS

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**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/15/13 | 1 | NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Dennis Hasty, FILED. [880930] [13-981] [Entered: 03/19/2013 03:11 PM] |
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| 3/18/13 | 5 | NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant James Sherman, FILED. [881478] [13-999] [Entered: 03/20/2013 09:26 AM] |
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| 4/25/13 | 1 [*from case 13-1662*] | NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellants Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akhil Sachdeva and Ibrahim Turkmen, FILED. [924303] [13-1662] [Entered: 05/01/2013 12:07 PM] |
| | | * * * * * |
| 4/25/13 | 5 [*from case 13-1662*] | AMENDED NOTICE OF APPEAL, with copy of district court docket, on behalf of Appellant Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akhil Sachdeva and Ibrahim Turkmen, FILED. [924331] [13-1662] [Entered: 05/01/2013 12:17 PM] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 5/10/13 | 95 | MOTION, to extend time, to consolidate appeals, on behalf of Appellee Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akhil Sachdeva and Ibrahim Turkmen in 13-981, FILED. Service date 05/10/2013 by email. [933979] [13-981, 13-999, 13-1002, 13-1003] [Entered: 05/10/2013 01:19 PM] |
| 5/16/13 | 100 | MOTION ORDER, granting motion to consolidate appeals [95] filed by Appellee Ibrahim Turkmen, Akhil Sachdeva, Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda and Purna Bajracharya in 13-981, by Christopher F. Droney, Circuit Judge., FILED. [939129] [100] [13-981, 13-999, 13-1002, 13-1003] [Entered: 05/16/2013 09:01 AM] |
| 5/16/13 | 102 | MOTION ORDER, granting motion to consolidate appeals [933941-3] filed by Appellant Ibrahim Turkmen, Akhil Sachdeva, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda and Purna Bajracharya, by Christopher F. Droney, Circuit Judge., FILED. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | [939140] [102] [13-1662] [Entered: 05/16/2013 09:09 AM] |
| 5/16/13 | 103 | NOTE: See lead case, 13-981, containing complete set of docket entries. [939474] [13-1662] [Entered: 05/16/2013 11:06 AM] |
| 5/16/13 | 104 | CAPTION, consolidate appeals, AMENDED. [939486] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 05/16/2013 11:09 AM] |
| | | * * * * * |
| 6/24/13 | 108 | CAPTION, Ahmer Abbasi, Plaintiff-Appellee-Cross-Appellant, AMENDED. [973176] [13-981] [Entered: 06/24/2013 11:51 AM] |
| | | * * * * * |
| 12/17/13 | 210 | DEFERRED APPENDIX, volume 1 of 2, on behalf of Appellant-Cross-Appellee James Sherman in 13-981, Appellant James Sherman in 13-999, FILED. Service date 12/17/2013 by CM/ECF. [1116947] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/17/2013 04:02 PM] |
| 12/17/13 | 211 | DEFERRED APPENDIX, volume 2 of 2, on behalf of Appellant-Cross-Appellee James Sherman in 13-981, Appellant James Sherman in 13-999, FILED. Service date 12/17/2013 |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | by CM/ECF. [1117099] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/17/2013 05:01 PM] |
| 12/26/13 | 213 | FINAL FORM BRIEF, on behalf of Cross-Appellee John Ashcroft and Robert Mueller in 13-981, Appellee John Ashcroft and Robert Mueller in 13-1662, FILED. Service date 12/26/2013 by CM/ECF. [1122326] [13-981, 13-1662] [Entered: 12/26/2013 08:48 PM] |
| 12/26/13 | 214 | CORRECTED BRIEF, on behalf of Cross-Appellee John Ashcroft and Robert Mueller in 13-981, Appellee John Ashcroft and Robert Mueller in 13-1662, FILED. Service date 12/26/2013 by CM/ECF. [1122327] [13-981, 13-1662] [Entered: 12/26/2013 08:54 PM] |
| 12/27/13 | 215 | FINAL FORM BRIEF, on behalf of Cross-Appellee James W. Ziglar, FILED. Service date 12/27/2013 by CM/ECF, US mail. [1122689] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/27/2013 01:05 PM] |
| 12/30/13 | 216 | DEFECTIVE DOCUMENT, Corrected Brief, [214], on behalf of Cross-Appellee John Ashcroft and Robert Mueller, FILED. [1123165] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | [13-981] [Entered: 12/30/2013 10:45 AM] |
| | | * * * * * |
| 12/31/13 | 219 | FINAL FORM BRIEF, on behalf of Appellee-Cross-Appellant Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akil Sachveda and Ibrahim Turkmen in 13-981, FILED. Service date 12/31/2013 by CM/ECF. [1123971] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/31/2013 09:55 AM] |
| 12/31/13 | 220 | FINAL FORM REPLY BRIEF, on behalf of Appellee-Cross-Appellant Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akil Sachveda and Ibrahim Turkmen in 13-981, FILED. Service date 12/31/2013 by CM/ECF. [1123993] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/31/2013 10:07 AM] |
| 12/31/13 | 221 | FINAL FORM BRIEF, on behalf of Appellant-Cross-Appellee James Sherman in 13-981, Appellant James Sherman in 13-999, FILED. Service date 12/31/2013 by CM/ECF. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | [1124154] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/31/2013 11:38 AM] |
| 12/31/13 | 222 | FINAL FORM REPLY BRIEF, on behalf of Appellant-Cross-Appellee James Sherman in 13-981, Appellant James Sherman in 13-999, FILED. Service date 12/31/2013 by CM/ECF. [1124156] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/31/2013 11:38 AM] |
| 12/31/13 | 223 | FINAL FORM BRIEF, on behalf of Appellant-Cross-Appellee Dennis Hasty, FILED. Service date 12/31/2013 by CM/ECF. [1124325] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/31/2013 02:49 PM] |
| 12/31/13 | 224 | FINAL FORM REPLY BRIEF, on behalf of Appellant-Cross-Appellee Dennis Hasty, FILED. Service date 12/31/2013 by CM/ECF. [1124326] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/31/2013 02:50 PM] |
| 1/2/14 | 225 | FINAL FORM BRIEF, on behalf of Cross-Appellee John Ashcroft and Robert Mueller in 13-981, Appellee John Ashcroft and Robert Mueller in 13-1662, FILED. Service date |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 12/26/2013 by CM/ECF. [1125196] [13-981, 13-1662] [Entered: 01/02/2014 04:41 PM] |
| 1/6/14 | 226 | CURED DEFECTIVE DOCUMENT: BRIEF, [216], on behalf of—John Ashcroft and Robert Mueller in 13-999, FILED. [1125968] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 01/06/2014 11:54 AM] |
| | | * * * * * |
| 5/1/14 | 254 | CASE, before RSP, RR, RCW, C.JJ., HEARD. [1214414] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 05/01/2014 12:38 PM] |
| | | * * * * * |
| 6/17/15 | 266 | OPINION, affirming in part, reversing in part and remanding to the district court for further proceedings, by RSP, RR, RCW, C.JJ., FILED. [1534154] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 06/17/2015 09:37 AM] |
| 6/17/15 | 267 | OPINION, Concurring & Dissenting, by judge RR, FILED. [1534171] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 06/17/2015 09:43 AM] |
| 6/17/15 | 268 | CERTIFIED ORDER, dated 06/17/ |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 2015, to EDNY (BROOKLYN), ISSUED. [1534177] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 06/17/2015 09:47 AM] |
| 6/17/15 | 269 | CAPTION, per opinion filed 06/17/15, AMENDED. [1534202] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 06/17/2015 10:00 AM] |
| 6/17/15 | 273 | JUDGMENT, FILED. [1534773] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 06/17/2015 03:28 PM] |
| | | * * * * * |
| 7/15/15 | 288 | MOTION, to extend time, on behalf of Cross-Appellee John Ashcroft and Robert Mueller in 13-981, Appellee John Ashcroft and Robert Mueller in 13-1662, FILED. Service date 07/15/2015 by CM/ECF. [1554782] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 07/15/2015 03:30 PM] |
| 7/17/15 | 292 | MOTION ORDER, granting motion to extend time [288] filed by Cross-Appellee John Ashcroft and Robert Mueller, Appellee John Ashcroft and Robert Mueller, by RCW, FILED. [1556262] [292] [13-981, 13-999, 13- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 1002, 13-1003, 13-1662] [Entered: 07/17/2015 09:05 AM] |
| | | * * * * * |
| 8/14/15 | 295 | PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Cross-Appellee John Ashcroft and Robert Mueller in 13-981, Appellee John Ashcroft and Robert Mueller in 13-1662, FILED. Service date 08/14/2015 by CM/ECF. [1577280] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 08/14/ 2015 08:58 PM] |
| | | * * * * * |
| 8/17/15 | 298 | PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Cross-Appellee James W. Ziglar in 13-981, James W. Ziglar in 13-1003, FILED. Service date 08/17/2015 by CM/ECF. [1577932] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 08/17/2015 02:23 PM] |
| 8/17/15 | 300 | PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant-Cross-Appellee Dennis Hasty in 13-981, FILED. Service date 08/17/2015 by CM/ ECF. [1578382] [13-981, 13-1002, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 13-1003, 13-1662, 13-999] [Entered: 08/17/2015 07:47 PM] |
| 8/17/15 | 301 | PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant-Cross-Appellee James Sherman in 13-981, Appellant James Sherman in 13-999, FILED. Service date 08/17/2015 by CM/ ECF. [1578389] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 08/17/2015 09:57 PM] |
| 8/18/15 | 302 | DEFECTIVE DOCUMENT, PETITION FOR REHEARING/ REHEARING EN BANC, [300], on behalf of Appellant-Cross-Appellee Dennis Hasty in 13-981, Dennis Hasty in 13-999, 13-1003, Appellee Dennis Hasty in 13-1662, FILED. [1578456] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 08/18/ 2015 09:03 AM] |
| | | * * * * * |
| 8/18/15 | 306 | PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant-Cross-Appellee Dennis Hasty in 13-981, FILED. Service date 08/18/2015 by CM/ ECF. [1578839] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 08/18/2015 12:08 PM] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 8/18/15 | 307 | DEFECTIVE DOCUMENT, PETITION FOR REHEARING/ REHEARING EN BANC, [306], on behalf of Appellant-Cross-Appellee Dennis Hasty in 13-981, FILED. [1578871] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 08/18/ 2015 12:21 PM] |
| 8/18/15 | 308 | PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant-Cross-Appellee Dennis Hasty in 13-981, FILED. Service date 08/18/2015 by CM/ ECF. [1579002] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 08/18/2015 01:41 PM] |
| 8/18/15 | 309 | CURED DEFECTIVE PETITION FOR REHEARING/REHEARING EN BANC [308], on behalf of Appellant-Cross-Appellee Dennis Hasty in 13-981, FILED. [1579093] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 08/18/2015 02:32 PM] |
| 8/18/15 | 311 | ORDER, dated 08/18/2015, that Plaintiffs-Appellees-Cross-Appellants shall file a combined response to the petitions for rehearing or rehearing en banc filed |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | by Defendants-Appellants and Defendants-Cross-Appellees. Plaintiffs shall submit their response, which shall not exceed thirty (30) pages, excluding material not counted under Federal Rule of Appellate Procedure 32, no later than Tuesday, September 8, 2015, FILED. [1579167] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 08/18/2015 03:04 PM] |
| | | * * * * * |
| 8/25/15 | 317 | MOTION ORDER, granting motion to extend time [313] filed by Appellee-Cross-Appellant Ibrahim Turkmen, Akil Sachveda, Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, Purna Bajracharya and Appellee Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, Ashraf Ibrahim and Akhil Sachdeva in 13-981, by RSP, FILED. [1583670] [317] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 08/25/2015 08:57 AM] |
| 9/11/15 | 319 | OPPOSITION TO PETITION FOR REHEARING/REHEARING EN BANC, for rehearing en banc [308], |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | for rehearing en banc [306], for rehearing en banc [301], for rehearing en banc [300], for rehearing en banc [298], for rehearing en banc [295], on behalf of Appellee-Cross-Appellant Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Ibrahim Turkmen and Appellee Akhil Sachdeva in 13-981, Appellee Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akhil Sachdeva and Ibrahim Turkmen in 13-1002, 13-1003, Appellant Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akhil Sachdeva and Ibrahim Turkmen in 13-1662, 13-999, FILED. Service date 09/11/2015 by CM/ECF. [1596131] [13-981, 13-1002, 13-1003, 13-1662, 13-999] [Entered: 09/11/2015 11:37 AM] |
| 10/29/15 | 326 | ORDER, petition for rehearing or in the alternative for rehearing en banc denied, for Cross-Appellees John Ashcroft and Robert Mueller, FILED. [1631006] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 10/29/2015 02:58 PM] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/29/15 | 327 | ORDER, petition for rehearing or in the alternative for rehearing en banc denied, for Cross-Appellee James W. Ziglar, FILED. [1631013] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 10/29/2015 03:04 PM] |
| 10/29/15 | 328 | ORDER, petition for rehearing or in the alternative for rehearing en banc denied, for Appellant-Cross-Appellee Dennis Hasty, FILED. [1631022] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 10/29/2015 03:12 PM] |
| 10/29/15 | 330 | ORDER, vacating previous orders [326], [327], [328] dated 10/29/2015, denying the petitions for rehearing or rehearing en banc filed by Cross-Appellees John Ashcroft and Robert Mueller, Cross-Appellee James W. Ziglar, and Appellant-Cross-Appellee Dennis Hasty, FILED. [1631058] [13-999, 13-981, 13-1002, 13-1003, 13-1662] [Entered: 10/29/2015 03:39 PM] |
| 12/11/15 | 331 | EN BANC OPINION, denying, by DJ, JAC, RSP, RR, RCW, PWH, DAL, GEL, DC, RJL, SLC, CFD, concurring-RSP, RCW, dissenting-DJ, JAC, RR, PWH, DAL, CFD, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | FILED. [1661595] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/11/2015 09:08 AM] |
| 12/11/15 | 332 | OPINION, Concurring, by judge RSP, RCW, FILED. [1661598] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/11/2015 09:10 AM] |
| 12/11/15 | 333 | OPINION, Dissenting, by judge DJ, JAC, RR, PWH, DAL, CFD, FILED. [1661601] [13-981, 13-999, 13-1002, 13-1003, 13-1662] [Entered: 12/11/2015 09:11 AM] |
| | | * * * * * |

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
(BROOKLYN)

---

No. 02-CV-2307

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA RAJ BAJRACHARYA ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

*v.*

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER (MDC), MICHAEL ZENK, FORMER WARDEN MDC, JAMES SHERMAN, FORMER MDC ASSOCIATE WARDEN FOR CUSTODY, SALVATORE LOPRESTI, FORMER MDC CAPTAIN, AND JOSEPH CUCITI, FORMER MDC LIEUTENANT, DEFENDANTS

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**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 4/17/02 | 1 | Complaint filed and summons issued as to defendant(s) John Ashcroft, Dennis Hasty, John Does 1-10, Robert Mueller, James W. Ziglar. Filing fee $150.00. Receipt number: 260540.. Filed by Barbara J. Ol- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | shansky on behalf of Syed Amjad Ali Jaffri, Asif-Ur-Rehman Saffi, Ibrahim Turkmen. (Attachments: # 1 Civil Cover Sheet) (Bowens, Priscilla) (Entered: 04/17/2002) |
| | | * * * * * |
| 7/27/02 | 8 | Amended complaint. Filed by Barbara J. Olshansky on behalf of Akil Sachveda, Shakir Baloch, Hany Ibrahim, Yasser Ebraheim, Syed Amjad Ali Jaffri, Asif-Ur-Rehman Saffi, Ibrahim Turkmen. (Related document(s) 1 ) (DiLorenzo, Krista) (Entered: 07/31/2002) |
| | | * * * * * |
| 6/18/03 | 28 | AMENDED COMPLAINT *(Second)* against John Ashcroft, Dennis Hasty, John Does 1-20, Robert Mueller, John Roes 1-20, Michael Zenk, James W. Ziglar, filed by Shakir Baloch, Yasser Ebrahim, Hany Ibrahim, Syed Amjad Ali Jaffri, Akil Sachveda, Asif-Ur-Rehman Saffi, Ibrahim Turkmen. (DiLorenzo, Krista) (Entered: 06/19/2003) |
| | | * * * * * |
| 9/9/04 | 103 | Notice of MOTION to Intervene by Javaid Iqbal, Ehab Elmaghraby. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | (Attachments: # 1 Declaration # 2 Certificate of Service) (Reinert, Alexander) (Entered: 09/09/2004) |
| 9/9/04 | 104 | MOTION to Intervene , *Memorandum of Law in Support of Intervention* by Ehab Elmaghraby, Javaid Iqbal. (Attachments: # 1 Certificate of Service) (Reinert, Alexander) (Entered: 09/09/2004) |
| | | * * * * * |
| 9/13/04 | 107 | ORDER. This Court orders that plaintiffs' motion to amend as set forth in paragraphs 1, 2, 3, 4, 5, 8, 9, and 10 of plainitffs' Notice of Motion for Leave to Amend the Complaint be granted. Signed by Judge Cheryl L. Pollak on 09/10/04. (Caggiano, Diana) (Entered: 09/13/2004) |
| | | * * * * * |
| 9/13/04 | 109 | AMENDED COMPLAINT *(Third Amended Class Action Complaint)* against all defendants all defendants., filed by all plaintiffs. (Chang, Nancy) (Entered: 09/13/2004) |
| | | * * * * * |
| 9/22/04 | 114 | ORDER granting 103 Motion to Intervene, granting 104 Motion to Intervene. Signed by JudgeCheryl L. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Pollak on 9/14/04. (Greene, Donna) (Entered: 09/22/2004) |
| | | * * * * * |
| 1/25/05 | 205 | MOTION to Dismiss *the Third Amended Complaint* by James W. Ziglar, Dennis Hasty, United States, Michael Zenk, John Ashcroft, Robert Mueller. Responses due by 1/10/2005 (Attachments: # 1 Memorandum of Law in Support # 2 Exhibit Government's Exhibits A, B, and C) (Molina, Ernesto) (Entered: 01/25/2005) |
| | | * * * * * |
| 7/11/05 | 336 | MOTION to Dismiss *Third Amended Complaint* by James Sherman. (Attachments: # 1 Memorandum of Law in Support) (Sullivan, Thomas) (Entered: 07/11/2005) |
| | | * * * * * |
| 6/14/06 | 507 | ORDER granting in part and denying in part the defendants' motion to dismiss. Ordered by Judge John Gleeson on June 14, 2006. (Gleeson, John) (Entered: 06/14/2006) |
| | | * * * * * |
| 8/10/06 | 538 | NOTICE OF APPEAL by Dennis Hasty. Filing fee $ 455, receipt |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | number 1944871. (Murphy, Justin) (Entered: 08/10/2006) |
| | | * * * * * |
| 8/11/06 | 540 | NOTICE OF APPEAL as to 507 Order by James W. Ziglar. Filing fee $ 455, receipt number 1946391. (Bakhos, Bassel) (Entered: 08/11/2006) |
| | | * * * * * |
| 8/11/06 | 541 | NOTICE OF APPEAL as to 507 Order by James Sherman. Filing fee $ 455, receipt number 1946975. (Sullivan, Thomas) (Entered: 08/11/2006) |
| 8/14/06 | 542 | NOTICE OF APPEAL as to 507 Order by John Ashcroft, Robert Mueller. Filing fee $ 455. (Barghaan, Dennis) (Entered: 08/14/2006) |
| | | * * * * * |
| 8/30/06 | 550 | JUDGMENT that pltfs. motion for certification is granted; and that final judgment is hereby entered on claims 1, 2, 24, 25, and to the extent it was dismissed by the Memorandum and Order of June 14,2006 on claim 5. Ordered by Judge Clerk of |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Court on 8/22/06. (Greene, Donna) (Entered: 08/30/2006) |
| | | * * * * * |
| 9/8/06 | 556 | NOTICE OF APPEAL as to 550 Clerk's Judgment,, 544 Order, 507 Order by Ibrahim Turkmen, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, Ashraf Ibrahim, akhil sachdeva, Asif-Ur-Rehman Saffi. Filing fee $ 455, receipt number 1988819. (Winger, Michael) (Entered: 09/08/2006) |
| | | * * * * * |
| 8/14/09 | | **Minute Entry for Settlement Conference held on 8/13/2009 proceedings held before Chief Magistrate Judge Steven M. Gold:** Meerepol et al. for Turkmen plaintiffs, Reinert et al. for Iqbal, Handler et al. for United States. Settlement agreement reached with Turkmen MDC plaintiffs and United States. Counsel will submit a stipulation discontinuing these claims, or a status report on their efforts to do so, by October 1. A further settlement conference with Iqbal and the United States will be held at 10:00 a.m. on September 8. Principals with full settlement authority must be pre- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | sent or available by telephone. Argument on defendants' motion to stay is adjourned without date, to be rescheduled if a settlement is not reached on September 8. (Vasquez, Lea) (Entered: 08/14/2009) |
| | | * * * * * |
| 11/24/09 | | **Minute Entry for Interim Pretrial Conference held on 11/23/2009 before Chief Magistrate Judge Steven M. Gold:** Meerepol et al for plaintiffs, Handler for US, Barghaan for Ashcroft, other counsel. Discussion of plaintiffs' intention to move for leave to file a Fourth Amended Complaint held. No further action will be taken at this time in light of the pending proceedings before the Second CIrcuit Court of Appeals. (Tape # FTR 3:38-4:01.) (Vasquez, Lea) (Entered: 11/24/2009) |
| | | * * * * * |
| 2/25/10 | 700 | MANDATE of USCA as to 540 Notice of Appeal filed by James W. Ziglar, 542 Notice of Appeal filed by Robert Mueller, John Ashcroft, 556 Notice of Appeal, filed by Shakir Baloch, akhil sachdeva, Ashraf Ibrahim, Yasser Ebrahim, Asif-Ur-Rehman Saffi, Ibrahim Turkmen, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Hany Ibrahim, 538 Notice of Appeal filed by Dennis Hasty, 541 Notice of Appeal filed by James Sherman. The cross-appeals were ordered on the District Court's record and the parties brief. It is Ordered that the Order of the District Court is affirmed in part, vacated in part and remanded for further proceedings in accordance with the opinion of this Court. Issued as Mandate: 2/25/10. USCA # 06-3745-cv (L); 06-3785-cv(CON); 06-3789-cv(CON); 06-3800-cv(CON): 06-4187-cv(XAP). Chambers notified. (Attachments: # 1 Opinion) (McGee, Mary Ann) (Entered: 03/03/2010) |
| | | * * * * * |
| 3/25/10 | 704 | MOTION to Intervene *and to Amend the Complaint* by Akil Sachveda, Ibrahim Turkmen, Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, Purna Bajracharya. (Attachments: # 1 Memorandum in Support, # 2 Certificate of Service, # 3 Letter regarding motion) (Meeropol, Rachel) (Entered: 03/25/2010) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 6/23/10 | | Minute Entry for Motion Hearing held on 6/22/2010 before Chief Magistrate Judge Steven M. Gold re 704 MOTION to Intervene *and to Amend the Complaint* filed by Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, Ahmer Abbasi, Ibrahim Turkmen, Purna Bajracharya, Akil Sachveda, Anser Mehmood: Meeropol et al for plaintiffs; Handler for United States; Barghaan for defendant Ashcroft; Lawrence for defendant Mueller; Sampson for defendant Ziglar; Murphy for defendant Hasty; Klein for defendant Zenk; no appearance for defendant Sherman; no appearance for defendant LoPresti; Wolin for defendant Cuciti. Oral argument held on plaintiffs' motion for intervention and leave to amend. Decision reserved. (Court Reporter Sheldon Silverman.) (Vasquez, Lea) (Entered: 06/23/2010) |
| 6/30/10 | 714 | REPORT AND RECOMMENDATIONS re 704 MOTION to Intervene and to Amend the Complaint, respectfully recommending that plaintiffs' motion for leave to intervene and to file a Fourth Amended Complaint be granted. Objections |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | to R&R due by 7/19/2010. Ordered by Chief Magistrate Steven M. Gold on 6/30/2010. (O'Connor, Erin) (Entered: 06/30/2010) |
| | | * * * * * |
| 7/21/10 | 717 | OBJECTION to 714 Report and Recommendations (*on behalf of remaining individual defendants*) filed by John Ashcroft. (Attachments: # 1 Exhibit A) (Barghaan, Dennis) (Entered: 07/21/2010) |
| 8/4/10 | 718 | REPLY in Opposition re 717 Objection to Report and Recommendations filed by Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akil Sachveda, Ibrahim Turkmen. (Attachments: # 1 Exhibit 1) (Meeropol, Rachel) (Entered: 08/04/2010) |
| | | * * * * * |
| 8/11/10 | 721 | REPLY in Support *of Objections to Report and Recommendation* filed by John Ashcroft. (Barghaan, Dennis) (Entered: 08/11/2010) |
| | | * * * * * |
| 8/26/10 | 724 | ORDER: Please see the attached order granting the motion for leave to intervene and to file a Fourth |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Amended Complaint, 704, upon the recommendation of Magistrate Judge Gold, 714. Ordered by Judge John Gleeson on 8/26/2010. (Reddy, Anitha) (Entered: 08/26/2010) |
| | | * * * * * |
| 9/13/10 | 726 | AMENDED COMPLAINT (*Fourth Amended Complaint*) against John Ashcroft, Joseph Cuciti, Dennis Hasty, Salvatore LoPresti, Robert Mueller, James Sherman, Michael Zenk, James W. Ziglar, filed by Ahmer Abbasi, Benamar Benatta, Purna Bajracharya, Saeed Hammouda, Ibrahim Turkmen, Ahmed Khalifa, Akil Sachveda, Anser Mehmood. (Attachments: # 1 Certificate of Service) (Meeropol, Rachel) (Entered: 09/13/2010) |
| | | * * * * * |
| 11/12/10 | 735 | MOTION to Dismiss *Fourth Amended Complaint* by John Ashcroft. Responses due by 12/23/2010 (Barghaan, Dennis) (Entered: 11/12/2010) |
| 11/12/10 | 736 | MEMORANDUM in Support re 735 MOTION to Dismiss *Fourth Amended Complaint* filed by John |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Ashcroft. (Barghaan, Dennis) (Entered: 11/12/2010) |
| 11/12/10 | 737 | MOTION to Dismiss *Fourth Amended Complaint* by James W. Ziglar. (McDaniel, William) (Entered: 11/12/2010) |
| 11/12/10 | 738 | MEMORANDUM in Support re 737 MOTION to Dismiss *Fourth Amended Complaint* filed by James W. Ziglar. (McDaniel, William) (Entered: 11/12/2010) |
| 11/12/10 | 739 | MOTION to Dismiss *Joining Defenant Ashcroft's Motion and Memorandum* by Robert Mueller. (Lawrence, R.) (Entered: 11/12/2010) |
| 11/12/10 | 740 | MOTION to Dismiss *Plaintiffs' Fourth Amended Complaint* by James Sherman. Responses due by 12/23/2011 (Attachments: # 1 Memorandum in Support) (Roth, Debra) (Entered: 11/12/2010) |
| | | * * * * * |
| 11/12/10 | 743 | MOTION to Dismiss *Fourth Amended Complaint* by Dennis Hasty. Responses due by 12/23/ 2010 (Bell, David) (Entered: 11/12/ 2010) |
| 11/12/10 | 744 | MEMORANDUM in Support re 743 MOTION to Dismiss *Fourth Amended Complaint* filed by Dennis |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Hasty. (Bell, David) (Entered: 11/12/2010) |
| | | * * * * * |
| 12/23/10 | 749 | RESPONSE in Opposition re 745 MOTION to Dismiss *Fourth Amended Complaint*, 735 MOTION to Dismiss *Fourth Amended Complaint*, 746 MOTION to Dismiss, 737 MOTION to Dismiss *Fourth Amended Complaint*, 739 MOTION to Dismiss *Joining Defenant Ashcroft's Motion and Memorandum*, 743 MOTION to Dismiss *Fourth Amended Complaint*, 741 MOTION to Dismiss *the Fourth Amended Complaint*, 740 MOTION to Dismiss *Plaintiffs' Fourth Amended Complaint* filed by Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood, Akil Sachveda, Ibrahim Turkmen. (Attachments: # 1 Certificate of Service) (Meeropol, Rachel) (Entered: 12/23/2010) |
| | | * * * * * |
| 1/12/11 | 751 | REPLY in Support re 737 MOTION to Dismiss *Fourth Amended Complaint* filed by James W. Zig- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | lar. (McDaniel, William) (Entered: 01/12/2011) |
| 1/12/11 | 752 | REPLY to Response to Motion re 735 MOTION to Dismiss *Fourth Amended Complaint* filed by John Ashcroft. (Barghaan, Dennis) (Entered: 01/12/2011) |
| 1/12/11 | 753 | REPLY in Support re 739 MOTION to Dismiss *Joining Defenant Ashcroft's Motion and Memorandum (and Joining 752 Defendant Ashcroft's Reply)* filed by Robert Mueller. (Lawrence, R.) (Entered: 01/12/2011) |
| 1/12/11 | 754 | REPLY in Support re 741 MOTION to Dismiss *the Fourth Amended Complaint* filed by Michael Zenk. (Brett, Kinrk) (Entered: 01/12/2011) |
| 1/12/11 | 755 | REPLY to Response to Motion re 740 MOTION to Dismiss *Plaintiffs' Fourth Amended Complaint* filed by James Sherman. (Roth, Debra) (Entered: 01/12/2011) |
| 1/12/11 | 756 | REPLY in Support re 743 MOTION to Dismiss *Fourth Amended Complaint* filed by Dennis Hasty. (Bell, David) (Entered: 01/12/2011) |

* * * * *

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 1/15/13 | 767 | ORDER granting Motions to Dismiss by 735 John Ashcroft, 737 James W. Ziglar, and 739 Robert Mueller in their entirety; and ORDER granting in part and denying in part Motions to Dismiss by 740 James Sherman, 741 Michael Zenk, 743 Dennis Hasty, 745 Salvatore LoPresti, and 746 Joseph Cuciti. Ordered by Judge John Gleeson on 1/15/2013. (O'Reilly, Helen) (Entered: 01/15/2013) |
| | | * * * * * |
| 3/15/13 | 778 | NOTICE OF APPEAL as to 767 Order on Motion to Dismiss, by Dennis Hasty. Filing fee $ 455, receipt number 0207-6072355. Service done electronically. (Lahlou, Shari) Modified on 3/15/2013 to reflect service. (McGee, Mary Ann). (Entered: 03/15/2013) |
| | | * * * * * |
| 3/15/13 | 779 | NOTICE OF APPEAL as to 767 Order on Motion to Dismiss, by James Sherman. No fee paid. Attorney notified. Service done electronically. (Shur, Justin) Modified on 3/18/2013 to reflect service and |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | fee status. (McGee, Mary Ann). (Entered: 03/15/2013) |
| | | * * * * * |
| 4/8/13 | | ORDER granting in part and denying in part 784 Motion for Entry of Judgment under Rule 54(b). At the parties' mutual agreement and having determined that there is no just reason for delay, the Clerk of Court is respectfully directed to enter final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing Claims One, Two, Three, and Seven against Defendants John Ashcroft, Robert Mueller and William Ziglar. Plaintiffs' motion for entry of judgment dismissing Claim Six is denied, as Defendants Ashcroft, Mueller, and Ziglar are not named as defendants in Claim Six. Ordered by Judge John Gleeson on 4/8/2013. (O'Reilly, Helen) (Entered: 04/08/2013) |
| 4/11/13 | 788 | CLERK'S JUDGMENT, Pltff's motion for entry of judgment under Rule 54(b) is granted to the extent that final judgment is entered pursuant to FRCP 54(b) dismissing Claims One, Two, Three and Seven against Defendants John Ashcroft, Robert Mueller and William Ziglar.. |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Ordered by Janet Hamilton, Deputy Clerk, on 4/10/2013. (Piper, Francine) (Entered: 04/11/2013) |
| | | * * * * * |
| 4/24/13 | 790 | NOTICE OF APPEAL as to 767 Order on Motion to Dismiss, by Ahmer Abbasi, Purna Bajracharya, Benamar Benatta, Saeed Hammouda, Ahmed Khalifa, Anser Mehmood. Filing fee $ 455, receipt number 0207-6154559. Appeal Record due by 5/8/2013. (Meeropol, Rachel) (Entered: 04/24/2013) |
| | | * * * * * |
| 4/24/13 | 791 | Subsequent/Amended NOTICE OF APPEAL 790 as to 767 Order by Akil Sachveda and Ibrahim Turkmen. No fee for Amended Appeal. Service done electronically. This Amended Notice of Appeal is being filed to include Appellants Akil Sachveda and Ibrahim Turkman. Please note: This Amended Notice of Appeal is being filed by the Appeals Clerk on behalf of attorney Rachel Meeropol due to technical difficulties with her ECF Service. (McGee, Mary Ann) (Entered: 04/24/2013) |

**U.S. Department of Justice**
Office of the Inspector General

# The September 11 Detainees:

## A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks

Office of the Inspector General

Apr. 2003

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Appendix K Letter from Deputy Attorney General Thompson

# CHAPTER ONE

# INTRODUCTION

## I. BACKGROUND

On September 11, 2001, terrorists hijacked four airplanes and flew two of them into the World Trade Center Towers in New York City and one into the Pentagon in Arlington, Virginia. The fourth plane crashed into a field in southwestern Pennsylvania before it could strike a target in Washington, D.C. The attacks killed more than 3,100 people, including all 246 people aboard the 4 airplanes.

The Federal Bureau of Investigation (FBI) immediately initiated a massive investigation, called "PENTTBOM," into this coordinated terrorist attack. The FBI investigation focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts. In addition, the FBI worked with other federal, state, and local law enforcement agencies to prevent follow-up attacks in this country and against U.S. interests abroad.

Shortly after the attacks, the Attorney General directed the FBI and other federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities."[1] One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had

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[1] Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (September 17, 2001).

detained, at least for questioning, more than 1,200 citizens and aliens nationwide.[2] Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others, however, were arrested and detained for violating federal immigration law.

Our review determined that the Immigration and Naturalization Service (INS) detained 762 aliens as a result of the PENTTBOM investigation. Of these 762 aliens, 24 were in INS custody on immigration violations prior to the September 11 attacks. The remaining 738 aliens were arrested between September 11, 2001, and August 6, 2002, as a direct result of the FBI's PENTTBOM investigation. All 762 detainees were placed on what became known as an "INS Custody List" because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism.

The Government held these aliens in a variety of federal, local, and private detention facilities across the United States while the FBI investigated them for ties to the September 11 attacks or terrorism in general. These

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[2] In the weeks and months following the attacks, various totals of the number of people arrested in connection with the September 11 investigation were released by the Department of Justice or appeared in media accounts. A senior official in the Department's Office of Public Affairs told the Office of the Inspector General that in the weeks after the terrorist attacks her office provided frequent updates to the media on the number of persons questioned, arrested, and detained by federal, state, and local law enforcement officials. According to this official, the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.

facilities included several Federal Bureau of Prisons (BOP) institutions such as the Metropolitan Detention Center in Brooklyn, New York; the Federal Detention Center in Oakdale, Louisiana; and the U.S. Penitentiary in Leavenworth, Kansas; INS facilities such as the Krome Service Processing Center in Miami, Florida; and state and local facilities under contract with the INS to house federal immigration detainees, such as the Passaic County Jail in Paterson, New Jersey, and the Hudson County Correctional Center in Kearny, New Jersey.

Soon after these detentions began, the media began to report allegations of mistreatment of the detainees. For example, detainees and their attorneys alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had no involvement in terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained.

Several individual detainees and non-profit organizations filed lawsuits against the Department of Justice (Department) protesting the lack of public information about the detainees and the length and conditions of the detainees' confinement. For example, the Center for National Security Studies brought suit against the Department under the Freedom of Information Act seeking information about the detainees, including their names and where they were being held.[3] Five detainees filed a class action lawsuit alleging they were physically abused, verbally abused, and held without a legitimate immigra-

[3] Center for National Security Studies v. United States Department of Justice, 01-civ-2500 (D.D.C. filed December 6, 2002).

tion or law enforcement purpose long after they received final removal or voluntary departure orders.[4] In addition, advocacy organizations such as Amnesty International and the Lawyers Committee for Human Rights issued reports asserting mistreatment of the detainees or mishandling of their cases.[5]

Pursuant to our responsibilities under the USA PATRIOT Act (Patriot Act) and the Inspector General Act, the Department of Justice Office of the Inspector General (OIG) initiated this review to examine the treatment of detainees arrested in connection with the Department's September 11 terrorism investigation.[6] Specifically, the OIG's review focused on:

- Issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
- Bond determinations for detainees;

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[4] Turkmen v. Ashcroft, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

[5] See, e.g., "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Human Rights Watch (August 2002); "A Year of Loss: Reexamining Civil Liberties Since September 11," Lawyers Committee for Human Rights (September 5, 2002).

[6] Pub. L. No. 107-56 (2001). The USA PATRIOT Act was signed by the President on October 26, 2001, approximately six weeks after the September 11 terrorist attacks. The Patriot Act provides new or enhanced law enforcement authorities, including the sharing of foreign intelligence information, increased penalties for money laundering and other financial crimes, and stricter controls on immigration. In addition, Section 1001 of the Patriot Act directs the OIG to receive and review claims of civil rights or civil liberties violations by Department employees.

- The removal process and the timing of removal; and
- Conditions of confinement experienced by detainees, including their access to legal counsel.

We focused our review on INS detainees housed at two facilities—the BOP's Metropolitan Detention Center (MDC) in Brooklyn and the Passaic County Jail (Passaic) in Paterson, New Jersey. We chose these two facilities because they held the majority of September 11 detainees and were the focus of many complaints about detainee mistreatment.

Our review did not seek to examine all aspects of the Department's terrorism investigation, including the specific investigative techniques involved in the September 11 investigation or the decisions made by federal, state, and local law enforcement on why to detain specific individuals.[7] Additional issues beyond the scope of this review include the reasons and justifications for the Department's decision to limit public release of information concerning arrests related to the ongoing terrorism in-

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[7] Some constitutional arguments have been raised regarding the Department's treatment of September 11 detainees. The claims were made in a variety of contexts, some of which are inapplicable in the immigration context and some of which are beyond the scope of this report. Removal proceedings are matters of civil rather than criminal law. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). Because they are not criminal proceedings, some constitutional protections that apply in the context of a criminal prosecution do not apply in a removal proceeding. For example, immigration detainees have no Sixth Amendment right to counsel. While they are permitted to be represented by an attorney, they must find and pay for the attorney themselves, unlike in criminal cases where the Government provides defendants with an attorney if they are unable to pay for counsel.

vestigation, its decision to close immigration proceedings to the public, and its use of voluntary interviews for certain categories of aliens.[8] Several lawsuits related to these issues are ongoing. In addition, our review did not examine the Department's use of material witness warrants to detain certain individuals in connection with its terrorism investigation, another issue currently being litigated in the courts.[9]

Rather, our review focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation. We examined the reasons why many of the detainees experienced prolonged confinement. In addition, we examined the detainees' conditions of confinement, including their access to counsel, access to medical care, and allegations of physical or verbal abuse by correctional officers.

In this report, we discuss the actions of senior managers at the Department, the FBI, the INS, and the BOP, who established the broad policies and led the investigation in response to the September 11 attacks; the actions of the INS, which processed and detained many of the

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[8] For example, on November 9, 2001, the Department and the FBI sought voluntary interviews with approximately 5,000 male visitors or foreign nationals between the ages of 18 and 33 who had entered the United States after January 2000 from countries "where there have been strong al Qaeda presences." See Attorney General John Ashcroft, Press Conference (March 20, 2002).

[9] A material witness warrant can be obtained from a judge upon a showing that the testimony of a person is material to a criminal proceeding and that it may become impracticable to secure the presence of the person by subpoena. See 18 U.S.C. § 3144. A person held on such a warrant is referred to as a "material witness." See United States v. Awadallah, 202 F. Supp. 2d. 55 (S.D.N.Y. 2002).

aliens arrested in the aftermath of September 11; and the actions of the BOP, which housed many of the detainees.

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges. It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation.

## II. METHODOLOGY OF THIS REVIEW

The OIG conducted interviews, fieldwork, and analysis for this review from March 2002 until March 2003. As noted above, we focused on two detention facilities, the MDC in Brooklyn, New York, and the Passaic County Jail in Paterson, New Jersey. We chose the MDC because it housed 84 aliens arrested in the aftermath of the September 11 terrorist attacks. In addition, the MDC received widespread media coverage for allegations of abuse against detainees and for the restrictive conditions of confinement it imposed on the detainees. We selected Passaic because it housed 400 aliens arrested in connection with the September 11 terrorism investigation—the most in any single facility—and, like the MDC, was the subject of many media articles regarding the treatment of detainees.

In this review, "September 11 detainees" are defined as aliens held on immigration violations in connection with the investigation of the September 11 attacks. The FBI

categorized these aliens as either "of interest," "of high interest," or "of undetermined interest" to its terrorism investigation. The INS treated all three categories as "September 11 detainees," and sometimes referred to them as "special interest" or "of interest" detainees.[10]

As noted above, the Department detained 762 aliens on immigration charges in connection with its terrorism investigation between September 2001 and August 2002. From the total of 475 September 11 detainees held at the MDC and Passaic,[11] we selected a sample of 119 detainees —53 held at the MDC and 66 confined at Passaic—to examine their detention experiences in detail.

Our MDC sample of 53 detainees was composed of 19 aliens who were being held at the facility during our site visit in May 2002; a random sample of 30 detainees previously held at the MDC but released or transferred prior to our May 2002 visit; and 4 detainees whose experiences at the MDC were the subject of media articles.

Our Passaic sample of 66 detainees was composed of 30 aliens reportedly held at the facility immediately prior to our site visit in May 2002; a random sample of 30 detainees held at Passaic but released or transferred prior to our May 2002 visit; and 6 detainees whose detentions at Passaic were the subject of media articles.[12]

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[10] In this report we generally refer to all three FBI categories collectively as "of interest," unless otherwise noted.

[11] Nine September 11 detainees were held at both Passaic and the MDC.

[12] The INS provided us with a list of 30 September 11 detainees who were being held at Passaic in April 2002. However, when we conducted our site visit in May 2002, the INS had released or transferred 17 of the 30 detainees.

We interviewed 32 detainees in these sample groups—19 housed at the MDC, 13 at Passaic—with their attorneys present if they requested. We also separately interviewed seven immigration attorneys who represented September 11 detainees held at the MDC or Passaic.

In addition, we reviewed the INS Alien Files (known as "A-Files") of 104 detainees from our sample of 119 September 11 detainees: 44 of the 53 detainees in our MDC sample and 60 of the 66 detainees in our Passaic sample.[13] The INS was unable to provide us with the remaining 15 A-Files for these detainees. At the MDC and Passaic, we also reviewed the facilities' records pertaining to the 119 detainees in our samples, including their administrative, disciplinary, and medical files. In addition, we reviewed available FBI Headquarters and FBI field office records for 54 September 11 detainees identified by the INS on January 23, 2002, as having been held longer than 90 days after receiving voluntary departure or removal orders.[14]

We also examined INS and BOP policies and procedures relating to immigration charging, conditions of confinement, and access to counsel. These included agency detention standards as well as specific policies applicable to the MDC and Passaic that were developed prior to and after the September 11 attacks. We focused on how the BOP and INS implemented these standards, and we examined the actions of managers at the Headquarters and local levels regarding their adherence to these policies.

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[13] The A-File, maintained by the INS, contains an alien's U.S. immigration history.

[14] See Chapter 6 for a discussion of final orders of removal.

In particular, we examined the following documents during our analysis:

- A database maintained by the INS's Custody Review Unit (CRU) that contains extensive INS records of the investigative and litigation histories of the September 11 detainees;
- A second CRU-maintained database that depicts the detention history of each September 11 detainee;
- A document used by FBI Headquarters to track the status of the detainee clearance process;
- The list of September 11 detainees cleared of connections to terrorism by the FBI New York Field Office (this FBI office conducted clearance investigations on more than 500 of the 762 September 11 detainees);
- FBI Headquarters files for a sample of 54 September 11 detainees maintained by the unit that coordinated the detainee clearance process, as well as corresponding FBI field office files for 46 of those 54 detainees; and
- The BOP's list of September 11 detainees held at the MDC.

In addition, we conducted more than 50 interviews of officials at the FBI, INS, BOP, and the Department of Justice regarding their involvement in developing and implementing the policies concerning the apprehension, detainment, investigation, and adjudication of September 11 detainee cases. Among the officials we interviewed were the Attorney General, the Deputy Attorney General (DAG), the Associate Deputy Attorney General responsi-

ble for immigration issues, and various officials in their offices; the Assistant Attorney General for the Criminal Division and attorneys from the Criminal Division involved in the September 11 investigation; the INS Commissioner; the INS Executive Associate Commissioner for Field Operations, the INS General Counsel, and a variety of other INS attorneys and staff; the FBI Director, the former Deputy Director, General Counsel, and other FBI officials; the BOP Director, the BOP's Assistant Director for Correctional Programs, and other BOP attorneys and staff; and officials in the Department's Executive Office for Immigration Review (EOIR).[15] During our fieldwork at the MDC and Passaic, we interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees. In addition, we interviewed managers and employees in the FBI's New York Field Office and Newark Field Office, the INS's New York and Newark District Offices, and the U.S. Attorney's Office for the Southern District of New York.[16]

During our review, we also met several times with representatives of Amnesty International and Human Rights Watch, who offered information and discussed their concerns about the treatment of aliens arrested after September 11. In addition, these organizations helped arrange interviews with some September 11 detainees or their attorneys. We also met with representatives from the American Civil Liberties Union, the

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[15] Throughout this report, most individuals are identified using the title they held at the time of the event or action under examination.

[16] Organization charts for the Department, FBI, INS, and BOP are attached at Appendix C.

Center for Constitutional Rights, the Islamic Circle of North America, and the Legal Aid Society.

## III. ORGANIZATION OF THIS REPORT

This report is organized into ten chapters and begins with this introduction to the report. Chapter 2 describes the initial actions taken by the Department in Washington, D.C., and New York City that affected the arrest, detention, and investigation of the September 11 detainees. It discusses demographic statistics on the September 11 detainees, including their age, citizenship, location, and date of arrest. It also describes the procedure used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the Department's terrorism investigation.

Chapter 3 discusses the charging of September 11 detainees with immigration violations. We identify policies, procedures, and issues that affected the timely charging of the detainees.

Chapter 4 examines the development and implementation of the Department's "hold until cleared" policy for September 11 detainees. It describes a series of operational orders issued by INS Headquarters to manage September 11 detainees. It also examines the processes implemented by the FBI to clear detainees of any connection to terrorism and the ramifications of this procedure on the detainees' length of confinement. We discuss why the FBI New York Field Office and INS New York District Office initially developed a separate list of September 11 detainees unbeknownst to FBI and INS Headquarters officials and the problems this presented. In addition, we describe the impact caused by the Department's decision to require Central Intelligence Agency

(CIA) name checks for each of the detainees. The chapter ends with an examination of the FBI's development of a "watch list" and its process for adding and removing names from that list.

Chapter 5 begins with basic information about federal immigration law, including the charging procedure for immigration violations, bond hearings, and removal proceedings.[17] It then examines the Department's opposition to bond for September 11 detainees and the INS's efforts to keep detainees in custody.

Chapter 6 discusses detainees with final removal and voluntary departure orders, the Department's decision to prevent removal of September 11 detainees until they were cleared by the FBI, and the eventual rescission of the policy. The chapter concludes with a review of the INS's compliance with a requirement that it conduct a review of the continued detention of aliens held for 90 days after they received removal orders.

Chapters 7 and 8 examine the conditions of confinement experienced by September 11 detainees at the MDC and Passaic facilities. Chapter 7 evaluates conditions at the MDC, including allegations of physical and verbal abuse, access to legal counsel, medical care, recreation, and other issues. Chapter 8 examines similar issues for September 11 detainees confined at Passaic.

In Chapter 9, we offer a series of recommendations to address the issues discussed in this report. Chapter 10

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[17] The 1996 amendments to the immigration laws combined "deportation" and "exclusion" proceedings into "removal" proceedings. In this report, we use the term "removal proceedings" to refer to all proceedings that sought to deport, exclude, or remove aliens from the United States.

provides our conclusions. The 11 Appendices contain a glossary of names (Appendix A) and terms (Appendix B), organization charts, various memoranda, and sample INS forms.

## CHAPTER TWO

## ARREST AND PROCESSING OF ALIENS IN RESPONSE TO THE SEPTEMBER 11 ATTACKS

This chapter describes the Department's initial response to the terrorist attacks. First, we examine the immediate actions taken by the FBI and INS in New York City to arrest and detain aliens in connection with the terrorism investigation. Next, we describe the Department's philosophy as it related to aliens arrested in connection with the terrorism probe, and we discuss some of the processes developed at FBI and INS Headquarters to coordinate information about these detainee cases. We also provide demographic statistics about the September 11 detainees. In addition, we describe the system used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the terrorism investigation.

### I. INITIAL LAW ENFORCEMENT RESPONSE

#### A. Initial FBI Response

The FBI took the lead in investigating the September 11 attacks, an investigation that became known as the Pentagon/Twin Towers Bombings investigation, or PENTTBOM. The FBI's investigation initially was affected by the chaotic situation in New York City as a result of the terrorist attacks, which displaced thousands of people from their homes and offices in lower Manhattan. As a result of the attacks, the FBI was forced to evacuate its New York City office in the Javits Federal Building at

26 Federal Plaza, seven blocks from what became known as "Ground Zero." Similarly, the INS was forced to evacuate all detainees housed at its Service Processing Center at 201 Varick Street in Manhattan's lower West Side.[18]

The FBI's focus immediately after the attacks was whether any of the airplanes remaining in the air posed a threat. Once air traffic over the United States had ceased completely, the FBI turned its attention to locating those responsible for the terrorist attacks and preventing future attacks. During the evening of September 11, the FBI New York Field Office moved telephones, computers, facsimile machines, and other equipment into a temporary command post in a parking garage [redacted]. In addition to the [redacted] site, the FBI created command posts [redacted] near midtown Manhattan and at FBI offices in Queens and Long Island, New York.

With the help of the airlines and the INS, the FBI quickly determined the names used by the hijackers and immediately began to pursue leads related to them. During this initial period, the overall terrorism investigation was coordinated from the FBI's high-security Strategic Information and Operations Center (SIOC) located at FBI Headquarters in Washington, D.C. The FBI Headquarters in Washington, D.C. coordinated the New York aspects of the terrorism investigation through the FBI's New York Joint Terrorism Task Force (JTTF), a group composed of a variety of law enforcement agencies in-

[18] INS Service Processing Centers process and detain illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country. A detainee could be held at a Service Processing Center from one day to several years.

cluding the INS, the New York Police Department, and the Drug Enforcement Administration.[19] In addition, prosecutors from the U.S. Attorney's Office for the Southern District of New York (SDNY) and the Eastern District of Virginia, in conjunction with the Department's Criminal Division, worked closely with the New York JTTF to direct major aspects of the terrorism investigation from both Washington, D.C., and New York City.

The day after the attacks, officials at FBI Headquarters began developing a "watch list" that initially was designed to identify potential hijackers and other individuals who might be planning additional terrorist acts once air travel resumed. By September 14, the FBI had forwarded the watch list, which at this point contained more than 100 names, to the Federal Aviation Administration, commercial airlines, FBI field offices, the U.S. Border Patrol, the U.S. Customs Service, and 18,000 state and local police departments across the country. According to FBI Director Robert Mueller, the watch list ultimately contained the names of "individuals the FBI would like to

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[19] Each of the FBI's 56 domestic field offices now leads a JTTF in its respective geographic area of responsibility. The FBI's New York Division formed the first JTTF in 1980. Participants in JTTFs include the INS; U.S. Secret Service; Naval Criminal Investigative Service; U.S. Marshals Service; U.S. Customs Service; Bureau of Alcohol, Tobacco, and Firearms; U.S. Department of State/ Diplomatic Security Service; Offices of Inspectors General; Postal Inspection Service; Internal Revenue Service; Department of Interior Bureau of Land Management; Air Force Office of Special Investigations; U.S. Park Police; Federal Protective Service; Defense Criminal Investigative Service; and other federal, state, and local law enforcement agencies.

talk to because we believe they have information that could be helpful to the [PENTTBOM] investigation."[20]

The FBI allocated massive resources to the September 11 terrorism investigation. Within 3 days of the attacks, more than 4,000 FBI special agents and 3,000 support personnel were assigned to work on the PENTTBOM probe. Six days after the attacks, FBI Director Mueller reported that more than 500 people representing 32 federal, state, and local law enforcement agencies were working 24 hours a day at FBI Headquarters. By September 18, 2001, 1 week after the attacks, the FBI had received more than 96,000 tips or potential leads from the public, including more than 54,000 through an Internet site it established for the PENTTBOM case, 33,000 that were forwarded directly to FBI field offices across the country, and another 9,000 tips called into the FBI's toll-free "hotline."

### B. Department of Justice Response

In response to the September 11 attacks, the Attorney General directed all Department of Justice components to focus their efforts on disrupting any additional terrorist threats. As articulated in a September 17, 2001, memorandum to all United States Attorneys from Attorney General Ashcroft, the Department sought to prevent future terrorism by arresting and detaining violators who "have been identified as persons who participate in, or lend support to, terrorist activities. Federal law enforcement agencies and the United States Attorneys' Offices will use every available law enforcement tool to inca-

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[20] FBI Director Robert Mueller, Press Conference at FBI Headquarters (September 14, 2001). We discuss the development and eventual dissolution of this watch list in greater detail in Chapter 4.

pacitate these individuals and their organizations." Given the identities of the September 11 terrorists, the Department recognized from the earliest days that its terrorism investigation had a significant immigration law component.

The Attorney General summarized the Department's new focus in a speech he gave to the U.S. Conference of Mayors on October 25, 2001:

> Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the Republic . . .
>
> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.
>
> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.
>
> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street. If suspects are found not to have links to ter-

rorism or not to have violated the law, they are released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.

The Attorney General told the OIG that he instructed that if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks.

The Deputy Attorney General explained to the OIG that the threat presented by terrorists who carried out the September 11 attacks required a different kind of law enforcement approach. He stated that the Department needed to disrupt such persons from carrying out further attacks by turning its focus to prevention, rather than investigation and prosecution.

Michael Chertoff, the Assistant Attorney General for the Criminal Division, told the OIG that within days of the attacks it became evident that some aliens encountered in connection with the PENTTBOM investigation were "out of status" in violation of the law—a matter that fell within the jurisdiction of the INS. He stated the Department's policy was to "use whatever means legally available" to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed. In some instances, he noted, that would mean detaining aliens on immigration charges, and in other cases criminal charges. Chertoff said he did not believe that the Department had a blanket policy to go with one or the other, if both were possible. He said he understood the Department would use whichever charge was most "efficacious." He stated that he was involved in meetings with

the Attorney General, the Deputy Attorney General, and the FBI Director at which this philosophy was discussed, but he added that, from the beginning, there was an insistence from senior Department officials that things be done legally. Chertoff explained that his deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division.

Fisher told the OIG that during the fall of 2001 she spent the "majority" of her time on terrorism issues, some of which involved illegal aliens who presented a potential terrorism threat. She recalled that Chertoff told her "we have to hold these people until we find out what is going on." She said she understood that the Department was detaining aliens on immigration violations that generally had not been enforced in the past.

### C. New York FBI's Response

The FBI Field Office in New York City and its JTTF received thousands of leads from the public related to terrorism in the weeks after September 11. Staff at the New York JTTF command post entered the leads into an FBI database that assigned each PENTTBOM lead a unique number. Leads then were sent to one of the four FBI command posts in the New York City area and assigned to a JTTF team that included FBI and INS agents, among other law enforcement personnel.

Many of the leads pursued by the JTTF in New York City and elsewhere across the country involved aliens, many from countries with large Arab or Muslim populations. If JTTF teams in New York encountered an illegal alien in the course of pursuing a PENTTBOM lead —whether or not the alien was the subject of the lead— the INS agent on the team examined the alien's immi-

gration and identity documents to determine whether the alien was lawfully in the United States. If an INS agent was not present during the JTTF's initial interview of the individual, the team notified the INS New York District Office, which dispatched an INS agent to determine the alien's immigration status. The team would arrest any alien encountered in the course of investigating a JTTF or PENTTBOM lead who was found to be in the country illegally.

Many of the aliens arrested under these circumstances were put into a special category referred to as persons "of interest" to the FBI. Their names were placed on a list referred to as "the INS Custody List." The INS and FBI did not always agree on which aliens should be included on the list, and we found that the cases were not handled uniformly nationwide. The complexities of how a person came to be included in this special category of immigration detainees is discussed in detail in Chapter 4, where we also examine some of the problems that arose from creation of this category of detainees. Moreover, as we describe later in this report, being labeled "of interest" had significant ramifications for the detainees' place and length of detention. The Department severely limited these detainees' ability to obtain bond, and detainees on this list could not be removed from the United States without a written "clearance letter" from the FBI. These requirements created substantial obstacles for detainees who sought release or removal. We describe these issues in more detail in the chapters that follow.

In conjunction with the New York FBI's JTTF, the U.S. Attorney's Office for the SDNY immediately began to investigate the terrorist attacks. David Kelley, the Deputy United States Attorney for the SDNY, helped

direct the search warrants, subpoenas, and material witness warrants in the Southern District and also participated in the supervision of the PENTTBOM task force in Washington, D.C. Within one to three days after the attacks, Kelley explained, he focused on individuals "really" of "investigative interest" (as opposed to those simply labeled "special interest" by the FBI or the INS). He explained that individuals of "genuine investigative interest" were people connected to a subject or target of the investigation, such as a person whose telephone number was linked to a hijacker, or a person who lived in a building near a location of high interest.

### D. SIOC Working Group

Within one week of the attacks, a group was established by Deputy Assistant Attorney General Alice Fisher to coordinate efforts among the various components within the Department that had an investigative interest in or responsibility for the September 11 detainees. This group became known as the "SIOC Working Group" because its initial meetings took place in the FBI's SIOC. In addition to the FBI, the Working Group included staff from the INS; the Department's Office of Immigration Litigation (OIL); the Terrorism and Violent Crime Section (TVCS) of the Department's Criminal Division, which reported directly to Fisher; and the Office of the Deputy Attorney General.[21]

The SIOC Working Group met daily during the first months after the attacks, and sometimes multiple times within a single day. As one of its duties, the group coor-

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[21] OIL is the unit within the Department's Civil Division that handles immigration litigation, while TVCS assists federal prosecutors nationwide in prosecuting terrorism cases.

dinated information and evidence sharing among the FBI, INS, and U.S. Attorneys' offices related to the September 11 detainees. As discussed in detail in Chapter 4, the group sought to ensure that aliens detained as part of the PENTTBOM investigation would not be released until they were cleared by the FBI of involvement with the September 11 attacks or terrorism in general. FBI participants from its Office of General Counsel assisted in preparing affidavits to support INS opposition to bond for these detainees, while FBI agents coordinated with FBI field offices to obtain information regarding clearance investigations for detainees. INS attorneys on the SIOC Working Group served as a link to INS Headquarters and its field offices. The assessments of individual detainee cases communicated by the FBI to the INS at the SIOC Working Group, as we describe later, had a significant impact on detainees' ability to obtain bond or be removed from the United States.

The FBI created an "INS Detainee Unit" in October 2001 located in the SIOC to handle detainee cases. This group, staffed by FBI special agents and others from the FBI Counterterrorism Division, worked closely with the SIOC Working Group to handle detainee matters.

## II. ARRESTS OF SEPTEMBER 11 DETAINEES

For the most part, the 762 aliens classified as September 11 detainees were arrested by FBI-led terrorism task forces pursuing investigative leads and were held on valid immigration charges.[22] These leads ranged from information, obtained from searches of the hijackers' cars

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[22] We found one instance in which a September 11 detainee was held for over 72 hours before being released, despite the fact that there was no valid immigration charge.

and personal effects to anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules.

In New York, the JTTF moved aggressively to pursue the thousands of PENTTBOM leads that poured into the FBI in the days and weeks after the terrorist attacks. Witnesses both inside and outside the FBI told us that given the wide-ranging nature of the terrorism probe, the FBI interpreted and applied the term "of interest to the September 11 investigation" quite broadly. For example, a supervisory special agent in the FBI's New York Field Office who was in charge of the unit responsible for detainee clearance investigations told the OIG that if JTTF agents searching for a particular person on a PENTTBOM lead arrived at a location and found a dozen individuals out of immigration status, each of them were considered to be arrested in connection with the PENTTBOM investigation. He said no distinction generally was made between the subjects of the lead and any other individuals encountered at the scene "incidentally," because the FBI wanted to be certain that no terrorist was inadvertently set free. Consequently, he said all of the aliens in the above situation would be arrested on immigration charges and treated as "of interest" to the September 11 investigation because there was no way to tell who might be an associate of the subject of the lead.

PENTTBOM leads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant. For example, several Middle Eastern men were arrested and treated as connected to the September 11 investigation when local law enforcement authorities discovered "suspicious items," such as pictures of the

World Trade Center and other famous buildings, during traffic stops. Similarly, local police stopped three Russian tourists because they were observed photographing "sensitive" locations in New York City, such as the Holland Tunnel. Another man was arrested on immigration charges and labeled a September 11 detainee when authorities discovered that he had taken a roll of film to be developed and the film had multiple pictures of the World Trade Center on it but no other Manhattan sites. This man's roommates also were arrested when law enforcement authorities found out they were in the United States illegally, and they too were considered September 11 detainees.

September 11 detainees and other witnesses interviewed by the OIG provided additional examples of how some aliens were arrested and labeled "September 11 detainees," including:

- Shortly before the September 11 attacks, an alien from [redacted], who worked at a [redacted], struck up a conversation with a [redacted] who paid for a purchase using an aviation-related credit card. During the conversation, the alien allegedly told the [redacted] that he would like to learn how to fly an airplane. After the September 11 attacks, the [redacted] called the FBI and recounted his conversation with the [redacted]. The INS subsequently arrested the alien when it determined he was out of immigration status, and he was considered a September 11 detainee.

- Another alien treated as a September 11 detainee was arrested at his apartment in [redacted] a few days after a caller told the FBI that "two Arabs"

rented a truck from his [redacted] vehicle rental business on September [redacted] for a one way trip to a [redacted] city, and then returned it [redacted] minutes later having gone only [redacted] miles. They were, according to the caller, "extremely nervous," and did not argue when told they would not be refunded the hundreds of dollars they had paid for the rental.

- Another alien was arrested, detained on immigration charges, and treated as a September 11 detainee because a person called the FBI to report that the [redacted] grocery store in which the alien worked, "is operated by numerous Middle Eastern men, 24 hrs—7 days a week. Each shift daily has 2 or 3 men. . . . Store was closed day after crash, reopened days and evenings. Then later on opened during midnight hours. Too many people to run a small store."

## III. ASSIGNMENT TO A DETENTION FACILITY

Our review determined that September 11 detainees arrested in New York City generally were confined at the MDC or transported to Passaic and other INS contract facilities in northern New Jersey. The housing determination for a September 11 detainee was the result of a two-step process that began with the FBI's assessment of the detainee's possible links to terrorism. The FBI provided this assessment to the INS, which made the actual housing determination. Witnesses told the OIG that the INS's determination was based almost solely on the FBI's assessment.

Where a September 11 detainee was housed had significant ramifications on the detainee's detention experiences. Detainees housed at the MDC (discussed in

Chapter 7) experienced much harsher confinement conditions than those held at Passaic (discussed in Chapter 8). The September 11 detainees held at the MDC were locked down 23 hours a day, were placed in four-man holds during movement, had restricted phone call and visitation privileges, and had less ability to obtain and communicate with legal counsel.

### A. FBI Assessment

The first part of the process to determine where a September 11 detainee would be confined began with the FBI's initial assessment of the detainee's links to the PENTTBOM investigation or ties to terrorism. The FBI assessed a detainee as "high interest," "of interest," or "interest undetermined." The "high interest" detainees were considered by the FBI to have the greatest potential to be linked to the PENTTBOM investigation or to terrorism. The FBI believed the "of interest" detainees might have some terrorist connections. For the "interest undetermined" detainees, the FBI could not affirmatively state that the detainee did not have a connection to the September 11 attacks. As we discuss in Chapter 4, this assessment was not based on specified criteria or consistently applied to all detainees. In addition, the INS was not authorized to release a September 11 detainee until the FBI completed its clearance investigation because of the concern about inadvertently releasing a terrorist. Therefore, the FBI in New York City never labeled a detainee "no interest" until after the clearance process was complete.

Almost all the September 11 detainees in our review were arrested by the INS. Often an FBI agent present at the arrest provided the INS with a verbal assessment of the FBI's level of interest in the particular detainee.

However, we found that this initial assessment often was based on little or no concrete information tying the detainee to the September 11 attacks or terrorism.

### B. INS Housing Determination

After the INS arrested September 11 detainees, they were taken to an immigration processing center, such as the INS's Service Processing Center on Varick Street in New York City, to complete arrest and initial detention processing (after the attacks the Center no longer housed detainees, but remained open for processing). The FBI New York Field Office identified its level of investigative interest in the detainee to the FBI's International Terrorism Operations Section (ITOS) at FBI Headquarters, which informed, usually verbally, the INS's National Security Unit (NSU). The information passed to the NSU by the FBI included a request that detainees of "high interest" be housed at the MDC.

From September 11 to 21, 2001, INS Executive Associate Commissioner for Field Operations Michael Pearson made all decisions regarding where to house September 11 detainees. According to Daniel Cadman, the NSU Director, NSU staff provided briefings to Pearson that consisted of the FBI's assessments, other derogatory information obtained during the investigation (if any), and the security risk posed by the detainee (if known). Based on this information, Pearson decided whether a detainee should be confined at a BOP facility (such as the MDC), an INS facility, or an INS contract facility (such as Passaic). Pearson's decision was relayed to the INS New York District, which transferred the detainees to the appropriate facility.

The INS's housing determination process changed on September 21, 2001, when the INS created the Custody Review Unit (CRU) at Headquarters and appointed three INS District Directors to make detainee housing determinations based on input provided by the FBI. At this point, Pearson removed himself from this decision-making process.

We were also told that some detainee housing determinations were made outside the process described above. Dan Molerio, Assistant District Director for Investigations in the INS New York District, said three Assistant U.S. Attorneys from the Southern District of New York detailed to the FBI Headquarters contacted him on a number of occasions and identified "high interest" detainees held by the INS in New York. Molerio said the FBI's Assistant Special Agent in Charge for Counterterrorism in New York also called him on several occasions about "high interest" detainees. Molerio said when the FBI told him a detainee was "high interest," he would ensure that the detainee was sent to the MDC.

In sum, even though the INS established a process for making housing determinations, the INS's decision was based almost entirely on the FBI's assessment.

### C. BOP Confinement Decisions

Soon after the September 11 attacks, the BOP made several decisions regarding the detention conditions it would impose on the September 11 detainees. These decisions (discussed in more detail in Chapter 7) included housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU), implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) inmates. According to Mi-

chael Cooksey, the BOP's Assistant Director for Correctional Programs, the BOP decisions were based on the BOP's concerns about potential security risks posed by the September 11 detainees. He said the BOP made the decision to impose strict security conditions in part because the FBI provided so little information about the detainees and because the BOP did not really know whom the detainees were. He said the BOP chose to err on the side of caution and treat the September 11 detainees as high-security detainees. He said that the Department was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities. Cooksey said the BOP did not treat the September 11 detainees different than "regular" high-security inmates.

BOP Director Kathy Hawk Sawyer told the OIG that officials in the Deputy Attorney General's Office contacted her to discuss specific detainees' ability to communicate with other inmates and with the outside world. She said she understood from these conversations that the Department wanted the BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC.[23]

### D. Department of Justice's Role

Witnesses told us that the Department of Justice had little input into where the detainees were held. For example, Chertoff, the Assistant Attorney General in charge of the Criminal Division, said he did not have any

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[23] We discuss Hawk Sawyer's conversations with Christopher Wray, Principal Associate Deputy Attorney General, and David Laufman, Chief of Staff to the Deputy Attorney General, in Chapter 7.

information about where or how the detainees would be held, with the exception of one conversation in which he was told that an alien had claimed he was hurt by a guard. He said that he was later told that the report was inaccurate, and that the alien had not made such an accusation. David Israelite, Deputy Chief of Staff to the Attorney General, said he could not recall any discussions of holding people "incommunicado" or any discussion of where detainees should be held. He also recalled one allegation of mistreatment being called to the attention of the Attorney General, who he said asked staff to look into the incident.

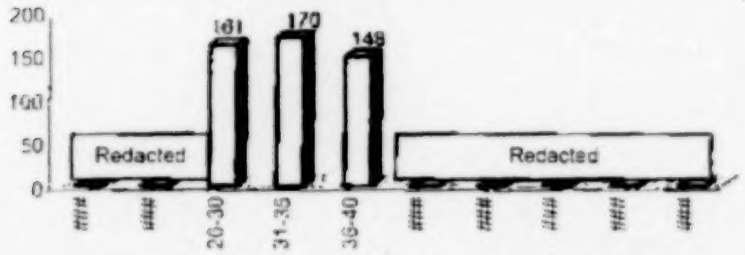
Alice Fisher, the Deputy Assistant Attorney General who was in charge of terrorism issues for the Criminal Division, stated that she had no information about which facility a detainee would go to or the conditions that would be imposed on the detainees. She noted that there was an "effort" to accommodate the needs of the Assistant U.S. Attorneys who were conducting the grand jury investigation into the attacks. David Kelley, the Deputy U.S. Attorney for the SDNY who played an important role in the September 11 investigation, said he had no input into where people would be confined, except that a person might be moved to the New York area if he was needed to testify. An Assistant U.S. Attorney from the SDNY who worked on the terrorism investigation explained that he generally did not have input into where detainees would be held. He recalled being frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk and those detained aliens who were uninvolved witnesses.

## IV. DEMOGRAPHICS OF SEPTEMBER 11 DETAINEES

The 762 September 11 detainees we reviewed were almost exclusively men, [redacted].

The age of the detainees varied, although most, 479 (or 63 percent), were between 26 and 40 years old. However, many of the detainees were much older. [redacted] See Figure 1.

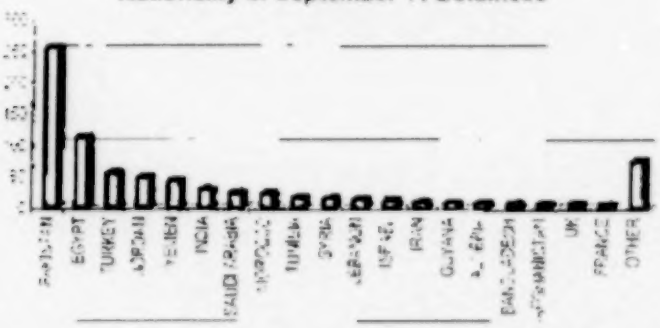
**Figure 1**
**Age Ranges for the September 11 Detainees**




The September 11 detainees were citizens of more than 20 countries. The largest number, 254 or 33 percent, came from Pakistan, more than double the number of any other country. The second largest number (111) came from Egypt. Nine detainees were from Iran and

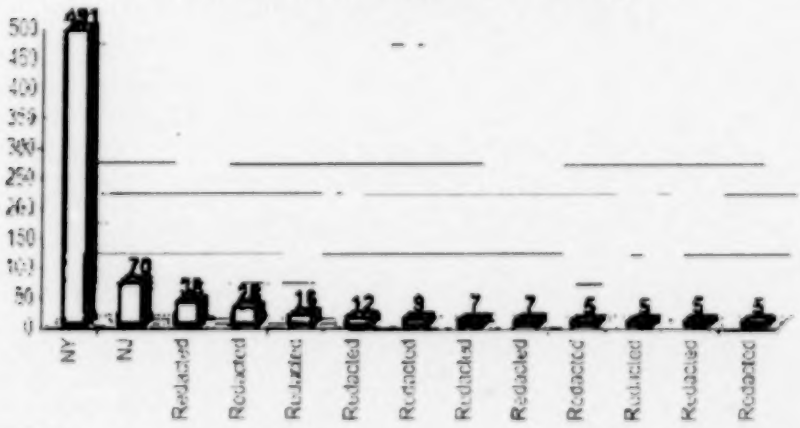
six from Afghanistan. In addition, 29 detainees were citizens of Israel, the United Kingdom, and France. See Figure 2.

Figure 2
Nationality of September 11 Detainees




The arrest location of a September 11 detainee proved significant because it determined which FBI field office had responsibility for, among other things, investigating the detainee for any connections to terrorism (the "clearance process" that we examine in detail in Chapter 4). By far the majority of detainees were arrested in New York (491 of 762, or 64 percent), followed by New Jersey with 70 detainee arrests, [redacted] with 38, [redacted] with 28, and [redacted] with 16. See Figure 3.

Figure 3
Arrest Location of September 11 Detainees



The timing of detainee arrests shows that 658 detainees (86 percent) were arrested in the first 3 months after the terrorist attacks. See Figures 4 and 5 for information on the numbers of September 11 detainees arrested by week and month. The most detainees arrested in a single week—85—were arrested during the week after the September 11 attacks.

**Figure 4**
**September 11 Detainee Arrests (By Week)**

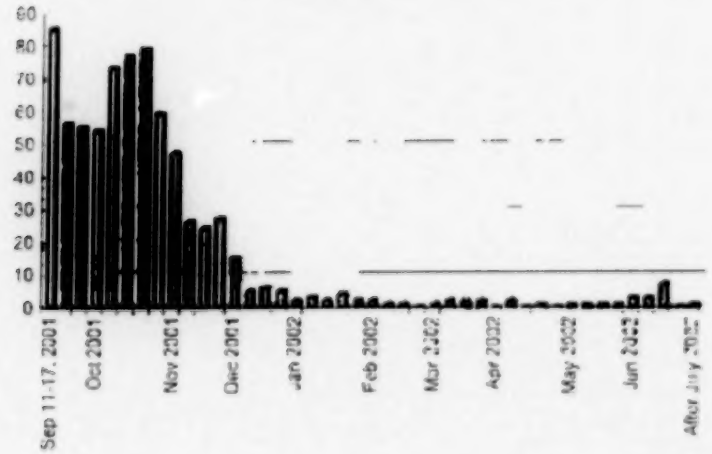



**Figure 5**
**September 11 Detainee Arrests (By Month)***

* Detainee arrest data for the month of September 2001 is as of September 11, 2001

## V. PROCESSING OF SEPTEMBER 11 DETAINEES FROM ARREST TO CLEARANCE

Perhaps the factor that most significantly affected the length of a September 11 detainee's confinement was the nature of the multi-step, multi-agency process used by the Department for handling aliens detained as part of its terrorism investigation. The OIG developed the following flow chart (Figure 6) to depict the process for handling September 11 detainees from their initial encounter with law enforcement authorities through their release from custody or removal from the United States. The chart displays the process used by the Department to investigate PENTTBOM leads, arrest September 11 detainees, determine where to house them, conduct detainee clearance investigations, complete the INS hearings and removal proceedings, and remove the detainees.[24]

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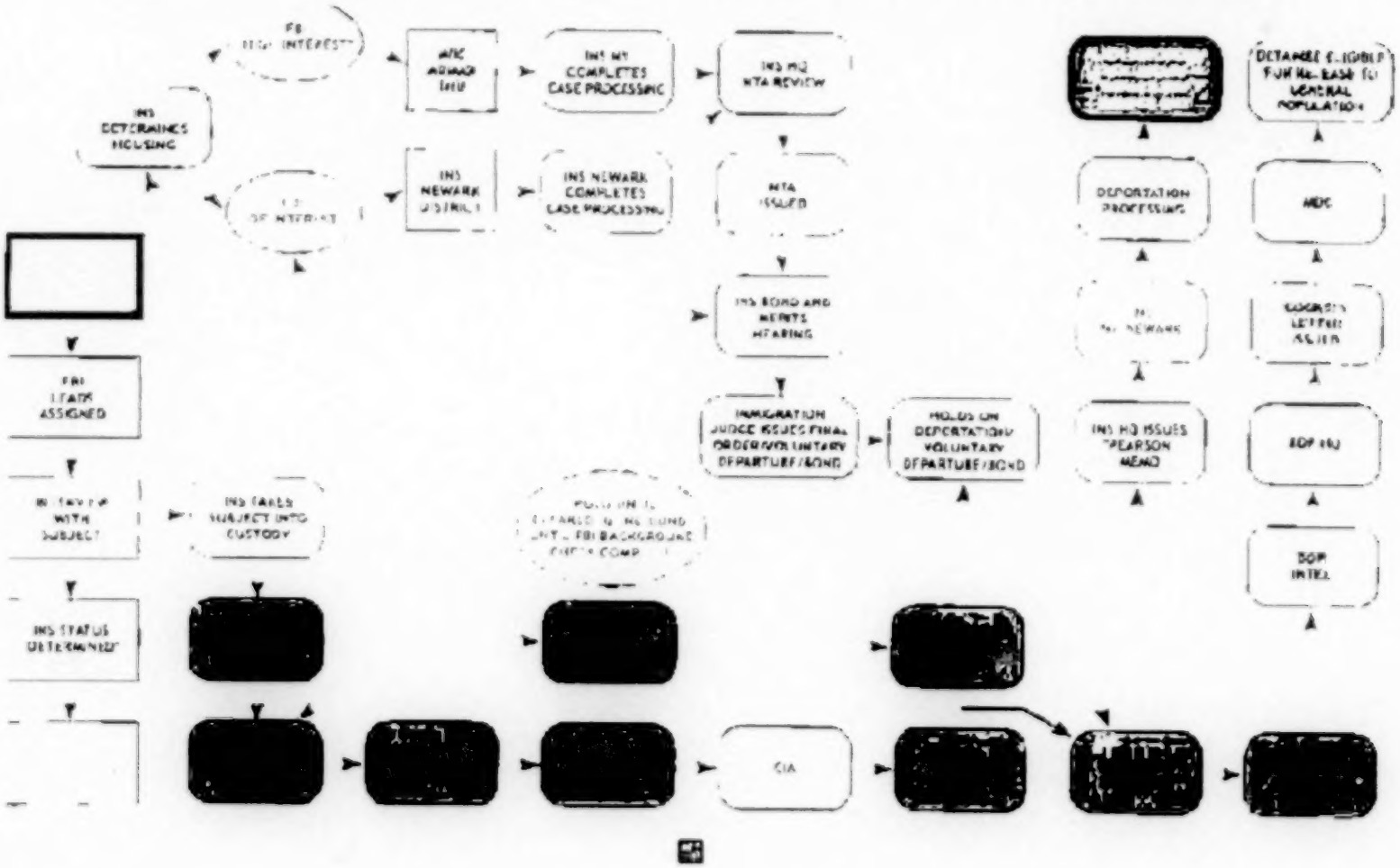
[24] The chart depicts the process for September 11 detainees held at the MDC or Passaic. Some detainees only went through part of this process, depending on their individual immigration cases and the progress of their FBI clearance checks. The "BOP Process" shown in the chart applied only to those detainees housed at the MDC.

# Processing September 11 Detainees from Arrest to Clearance - New York Region



The following steps describe the procedures depicted by this chart:

Arrest Process:

1. U.S. law enforcement received information regarding an individual who may have connections to the September 11 attacks or terrorism in general (a PENTTBOM lead).

2. If deemed worthy of investigation, the responsible FBI field office assigned the lead for investigation (in New York City, generally to the JTTF).

3. Law enforcement personnel interviewed the individual, and an INS agent determined his immigration status. The subject was released if the FBI expressed no investigative interest related to the terrorism probe and the individual had not violated his immigration status.

4. If the INS agent determined that the alien was in violation of immigration status, the INS agent took the alien into custody and asked the FBI for an assessment of its interest in the alien with respect to the terrorism investigation.

5. The FBI determined its level of interest in the alien: generally "of interest," "high interest," "no interest," or "undetermined." Based on this assessment by the FBI, "high interest detainees" were sent to BOP high-security facilities, while "of interest" and "interest unknown" detainees generally were housed in less restrictive facilities, such as county jails under contract to the INS.

FBI Clearance Process:

1. After the FBI received the detainee's A-File from

the INS, the FBI initiated detainee clearance investigations and notified the SIOC Working Group that the alien was in custody. The Department had issued a standing order that detainees were not to be released until clearance investigations were completed.

2. The SIOC Working Group requested CIA checks on the detainee.

3. If clearance investigations and CIA checks on the detainee were clear, the detainee was determined to be of "no interest" to the FBI.

4. The FBI's ITOS decided the final clearance of a September 11 detainee and issued a formal FBI clearance letter, signed by the ITOS Section Chief. Until the FBI issued the clearance letter, the Department did not allow the INS to remove the detainee.

5. The SIOC Working Group forwarded the FBI clearance letter to the INS or BOP, whichever agency was holding the alien. If the BOP was holding the alien, BOP Headquarters then issued its clearance memorandum to the BOP facility, called a "Cooksey memorandum," notifying the appropriate warden that a detainee was eligible for release into the facility's general population.[25]

INS Immigration Process:

1. After INS Headquarters review, the INS District Director in the INS district where the September 11 detainee was arrested issued the charging doc-

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[25] Cooksey memoranda were signed by Michael Cooksey, the BOP Assistant Director for Correctional Programs.

ument to the detainee (known as the "Notice to Appear" or NTA) that describes the immigration laws the detainee has allegedly violated. The INS initially held all September 11 detainees without bond, but the detainees were able to request bond re-determination hearings before an Immigration Judge after receiving the NTA and accompanying documents.

2. An Immigration Judge conducted a hearing on the detainee's alleged immigration violations (a "merits hearing") to determine whether the detainee should be removed from the United States.

3. The Immigration Judge issued a final order removing the detainee or permitting the detainee to leave the country voluntarily.

4. INS Headquarters issued its clearance memorandum —known as the "Pearson memorandum"—to the appropriate INS Region Office.[26] Issuance of the INS clearance letter was predicated on the INS receiving a clearance letter from the FBI stating that it had "no interest" in the detainee, as described above.

5. The alien was either removed from the United States, allowed to depart voluntarily, or released from INS custody.

The impact of each of these procedures on the length of the September 11 detainees' detentions and their

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[26] Pearson memoranda were signed by Michael Pearson, then the INS Executive Associate Commissioner for Field Operations.

conditions of confinement is discussed in detail in the chapters that follow.

## CHAPTER THREE

## CHARGING OF SEPTEMBER 11 DETAINEES

The INS arrested hundreds of aliens in New York City and across the country in the aftermath of the September 11 terrorist attacks, most often while working as part of a Joint Terrorism Task Force. While some of these arrests resulted in criminal charges, the vast majority of September 11 detainees were charged with civil violations of federal immigration law, including: 1) staying past the expiration date on their visas, 2) entering the country without inspection, or 3) entering the country with invalid immigration documents.

Service of the charging document by the INS—called the "Notice to Appear" or NTA—provided the detainees with their first clear description of the charges they faced. Because the Department initially opposed bond for all September 11 detainees, service of the NTA and associated documents provided detainees their first opportunity to seek release by requesting a bond re-determination hearing before an Immigration Judge.[27]

In this chapter, we examine the INS's provision of NTAs for September 11 detainees held on immigration violations. We also identify the policies, procedures, and timeliness of the INS's charging decisions, and we examine reasons for the delay in charging experienced by some detainees. In addition, we discuss efforts by officials at INS Headquarters to review and approve charging documents for all September 11 detainees and the impact this

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[27] A blank NTA form is attached at Appendix D.

Headquarters review had on the timely serving of NTAs and associated documents.

## I. INS REGULATIONS AND POLICIES GOVERNING THE TIMING OF CHARGING DECISIONS

### A. The Charging Determination

After an alien is arrested, the INS must decide whether to charge the alien with violating federal immigration law.[28] If the INS decides that immigration charges are warranted, it initiates a removal proceeding by serving the NTA on the alien and the Immigration Court. The NTA must include the alien's specific acts or conduct alleged to be in violation of the law. While an INS agent arrests the alien, an INS District Director, or his designee, makes the charging determination.[29]

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[28] Section 236A of the Patriot Act provides that the Attorney General may "certify" an alien if he has "reasonable grounds to believe" that the alien has violated any of the enumerated immigration provisions (all of which relate to terrorism, espionage, or national security), or if the Attorney General has "reasonable grounds to believe" that the alien "is engaged in any other activity that endangers the national security of the United States." Any alien certified under the section must be taken into custody. If the certified alien is not placed in removal proceedings or criminally charged within seven days of his detention, the statute instructs the Attorney General to release the alien. An alien detained solely under this section who has not been removed within the initial 90-day removal period and "whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." INA § 236A(a)(6). As of March 26, 2003, no alien had been certified by the Attorney General under these provisions.

[29] In criminal cases, defendants must be brought before a magistrate no later than 48 hours after arrest for a probable cause deter-

Prior to the September 11 attacks, the INS was required by federal regulation to make this charging determination within 24 hours of arresting an alien. See 8 C.F.R. § 287.3(d). Within days of the September 11 attacks, the INS found that meeting this 24-hour timetable would be difficult, given the number of aliens arrested and the prospects of significantly more alien arrests.

As a result, on September 17, 2001, the Department issued a new regulation that changed the time by which the INS had to make the charging determination to 48 hours after the alien's arrest.[30] The revised regulation contains an exception to this 48-hour rule (an exception not contained in the previous version), which provides that, in the event of an emergency or other extraordinary circumstances, the charging decision could be made within an additional reasonable period of time. The regulation does not define "extraordinary circumstances" or "reasonable period of time." It is important to note that the regulation contains no requirement with respect to when the INS must notify the alien or the Immigration Court about the charges—that is, when the NTA must be served on the alien. The regulation only addresses the timing of when the INS must make its charging determination. The INS does not record the date or time the charging determination is made.

### B. Serving the Notice to Appear (NTA)

Once the INS makes the decision to charge an alien with an immigration violation, it serves the NTA on the

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mination, except in exceptional circumstances. See Riverside v. McLaughlin, 500 U.S. 44 (1991). In the immigration context, the INS District Director makes this "probable cause" determination.

[30] 8 C.F.R. § 287.3.

alien and the Immigration Court in the jurisdiction where the alien is confined.[31] The NTA must be served on the alien in person where practicable, but also may be served by mail.

According to the INS General Counsel's Office, no statute or regulation explicitly states when the INS must serve the NTA on the alien or the Immigration Court. However, prior to the September 11 attacks, the INS's general practice was to serve the NTA on aliens within 48 hours of their arrests. According to Michael Rozos, Chief of the Long Term Review Branch in the INS's Office of Detention and Removal, after September 11 the INS established a goal of serving NTAs on aliens within 72 hours of arrest. Rozos said this goal was not established by regulation, but rather was based on "commonly recognized" INS practice. The INS keeps a record of the date the NTA is served.

## II. SERVICE OF NTAs ON SEPTEMBER 11 DETAINEES

Table 1 describes when NTAs were served on the September 11 detainees. According to INS data, 59 percent of these detainees (452 of 762) were served NTAs within 72 hours of their arrest, in accordance with INS practice. In the remaining 192 cases for which data was available, the INS took more than 72 hours to serve

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[31] 8 U.S.C. § 1229(a)(1). The INS is not required to serve NTAs on certain categories of aliens. For example, the INS is not required to serve NTAs on aliens under criminal indictment and not yet in INS custody until their criminal cases are resolved and the aliens have served their sentences. In addition, reinstatement of an alien's prior final order of removal does not require the INS to serve a new NTA.

NTAs.[32] Of these 192 detainees, 71 percent (137) were arrested by the INS in the New York City area. On average, September 11 detainees arrested in New York City and housed at the MDC received their NTAs 15 days from the time of their arrest.

Table 1
Number of Days Between Arrest Date and
NTA Served Date for September 11 Detainees

| Number of Days | Frequency | Percent of Total |
|---|---|---|
| 3 days or less | 452 | 59.3% |
| 4 - 10 days | 71 | 9.3% |
| 11 - 17 days | 43 | 5.6% |
| 18 - 24 days | 30 | 3.9% |
| 25 - 31 days | 24 | 3.1% |
| More than 31 days | 24 | 3.1% |
| Excluded from analysis | 118 | 15.5% |
| **Total** | 762 | 100%* |

*Rounded

Table 2 summarizes the timing of charges filed against all 762 September 11 detainees and for sub-sets of detainees in the OIG sample groups from the MDC and Passaic.

[32] Of the 762 detainees, 118 were excluded from this analysis for the following reasons: 90 were served with NTAs prior to September 11, 2001, because they already had a final order of removal on immigration violations before September 11, 2001; 21 were not required to be served with NTAs; and 8 had arrest dates prior to September 11, 2001.

| Table 2<br>Timing of NTA Service | | | |
|---|---|---|---|
| **Service of NTA** | **All Sept. 11 detainees** | **MDC detainees** | **Passaic detainees** |
| Detainees charged in 3 days or less | 452 (59.3 %) | 24 (45.3%) | 22 (33.3%) |
| Detainees charged in more than 3 days | 192 (25.2%) | 14 (26.4%) | 18 (27.3%) |
| Detainees with excluded values | 118 (15.5%) | 15 (28.3%) | 26 (39.4%) |
| **Total** | 762 (100.0%) | 53 (100.0%) | 66 (100.0%) |

## III. REASONS FOR DELAY IN SERVING NTAs

### A. Pending Criminal Charges

According to INS data, 12 of the 192 September 11 detainees served with NTAs more than 3 days after their arrests also were charged with a criminal offense. The INS is not required to serve an NTA on an alien charged with a September 11 detainee arrested in New York City on October 1, 2001, pursuant to a PENTTBOM lead, was charged with passport fraud, marriage fraud, and alien smuggling. The detainee was transported to the MDC on October 3, 2001. On April 3, 2002, the INS served an NTA on the detainee for the immigration violation of overstaying a nonimmigrant visitor visa for business purposes. The following day, the detainee was sentenced in the Eastern District of New York to "time served" on the alien smuggling charge. The detainee was removed from the United States on May 30, 2002. Because the detainee was in custody based on a criminal indictment, the INS was not required to serve his NTA at the time of his initial arrest.

We identified 5 September 11 detainees who the INS served with NTAs an average of approximately 168 days after their arrest. In some of these cases, we found ap-

propriate reasons for the delays—for example, two of the detainees were charged with both immigration and criminal offenses, but were held on the criminal offense and therefore were not in INS custody. Consequently, the INS did not serve NTAs on these two detainees until the BOP or the U.S. Marshals Service transferred custody of the detainees to the INS. However, according to INS data, once this transfer occurred, the INS still took 36 and 11 days, respectively, to serve NTAs on these detainees.

### B. Delays Caused by Logistical Disruptions in New York City

The closure of the INS New York District Office at 26 Federal Plaza and the suspension of overnight delivery service to lower Manhattan after the September 11 attacks contributed to delays in NTA service. The detainees' A-Files were stored at the National Records Center in Lee's Summit, Missouri, and the INS New York District had to request copies of the detainees' A-Files from the Records Center so that INS agents in New York City could determine the appropriate charges.[32] With the disruptions in lower Manhattan, delivery of the A-Files was often delayed. Initially, in an attempt to speed up the review process, employees from the INS New York District and the National Records Center tried to select specific documents from a detainee's A-File to fax to the INS New York District. However, INS New York District Counsel said this process was not

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[32] A-Files for September 11 detainees arrested in the New York City area had to be sent first to the INS New York District rather than to INS Headquarters because the District in which the detainee was arrested had to prepare and serve the NTA. A-Files are essential to preparing an NTA because they contain the detainees' complete immigration histories.

effective because attempting to describe legal documents over the telephone proved inadequate for the INS New York District to determine their significance to the detainee's case.

### C. Delays Caused by INS Headquarters Review of NTAs

We found that the INS policy requiring all charging documents for September 11 detainees to be reviewed and approved by INS Headquarters also may have contributed to the delay in serving NTAs on many detainees. On September 15, 2001, the INS issued an Operational Order (discussed in Chapter 4) that directed all INS field offices to transmit copies of September 11 detainee case documents, including NTAs, to the National Security Unit (NSU) at INS Headquarters. Another Operational Order issued the following day stated that no charging documents should be served until the "facts and circumstances of the case" were reviewed and approved for legal sufficiency both by the NSU and the INS's Office of General Counsel.[33] Prior to the September 11 attacks, INS attorneys in the District offices had reviewed and approved NTAs for legal sufficiency.

According to Pearson, the INS Executive Associate Commissioner for Field Operations, INS Commissioner James Ziglar decided that NTAs for all September 11 detainees had to be approved at INS Headquarters because of some "glaring errors" in detainee charging documents in several early detainee cases. Pearson said that three or four September 11 detainees were charged with

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[33] The INS Office of General Counsel formed a group of attorneys known as the Legal Sufficiency Unit at INS Headquarters to review the legal sufficiency of NTAs prepared for September 11 detainees.

incorrect violations of immigration law in the first week after the terrorist attacks. While he said that these errors were not "pervasive," the INS nonetheless was concerned that a potential terrorist could be released from INS custody because of erroneous charges on an NTA, and therefore wanted INS Headquarters officials to review all NTAs before they were served on the detainees.

Pearson's order required that the INS New York District fax a copy of the detainee's often-voluminous A-File to INS Headquarters. INS New York District Counsel told the OIG that the volume of documents being sent to INS Headquarters often caused facsimile machines at the INS New York District Office to break down. These facsimile transmission problems, coupled with the additional NTA review process at INS Headquarters, contributed to the delays in serving NTAs on the September 11 detainees.

On November 28, 2001, the INS rescinded the requirement that INS Headquarters review all NTAs for September 11 detainees and returned this responsibility to INS field offices. The chief of the INS's National Security Law Division said that by November 28 the volume of September 11 detainee arrests had diminished and that centralized NTA review no longer was required.

### D. Delays Caused by Transfers of September 11 Detainees

The INS was forced to close its Service Processing Center (SPC) on Varick Street in Manhattan after the terrorist attacks due to a loss of electricity and utilities. While detainees could no longer be housed in the Varick Street SPC, they could still be processed there. The INS's Eastern Region Office, which has jurisdiction over

both the New York and Newark Districts, determined that the Newark District had available bed space in contract county jails to house immigration detainees formerly held at the Varick Street SPC. On September 11, 2001, New York District staff transported to the Newark District all 244 aliens who had been held at the Varick Street SPC. According to INS data, approximately 200 more detainees arrested in connection with September 11 leads in New York City were subsequently transferred to the INS Newark District from September 11, 2001, through May 31, 2002.

Facility determinations for September 11 detainees initially were made by the INS New York District, but beginning on September 23, 2001, these decisions required the approval of INS Headquarters.[33] After INS Headquarters took over facility determinations for September 11 detainees, all detainees arrested in New York City were transported to the Newark District unless INS Headquarters informed the New York Office that a specific detainee should be held at the MDC. The INS deferred to FBI officials regarding decisions about whether detainees should be designated "high interest" and therefore housed in high-security facilities such as the MDC.[34]

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[33] Pearson said he decided to centralize reporting and transfer authority for detainees at INS Headquarters because INS District Offices did not have the "visibility" as to which detainees were of interest to the FBI. He said that he wanted to ensure that FBI agents in the field knew where detainees were being held in order to facilitate interviews.

[34] According to Pearson, "high interest" September 11 detainees had possible direct involvement with the September 11 terrorist attacks, needed to be interviewed by U.S. law enforcement, presented potential flight risks, and continued to present potential threats to

INS policy requires that NTAs and other legal documents be prepared by the arresting INS officer. Consequently, September 11 detainees arrested in the New York City area should have been processed for any immigration violations in the New York District, and Newark District officials should have received NTAs for all transferred detainees when the detainees arrived in the INS Newark District.[35] However, the New York Assistant District Director for Investigations told the OIG that the requirement for INS Headquarters review of all NTAs delayed this process, and many detainees already had been transferred to the INS Newark District by the time the INS New York District received INS Headquarters's sign-off on an NTA.

Because the detainees' A-Files did not accompany the detainees when they were transferred to the INS Newark District, the INS Newark District was unaware that the NTAs had not been served and was unable to take timely actions to ensure that the NTAs were served within the INS's 72-hour target.

The INS detention standards also require that the NTA and the alien's A-File or a substitute "temporary file" accompany a detainee being transferred to another INS detention facility, including facilities like Passaic under contract with the INS to house federal immigration

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the public. For a more extensive discussion of the detainee classification issue, see Chapter 4.

[35] On April 17, 2001, Scott Blackman, the INS Eastern Region Director, had issued standardized procedures for transfers of detainees between districts in the Eastern Region that specified responsibilities for "sending" Districts and "receiving" Districts. These procedures stated that all charging documents, including NTAs, will be "issued and signed" and served on detainees "prior to transfer."

detainees. We found that the INS New York District's failure to transfer all of the necessary paperwork for September 11 detainees arrested in New York but transferred to Newark resulted in inconsistent and untimely service of NTAs on the detainees.

Because the INS New York District transferred September 11 detainees to the INS Newark District before receiving INS Headquarters's approval of charging documents, NTAs for many of the September 11 detainees had not been served by the time of the transfer. Yet, both the INS New York and the Newark Districts assumed that the NTAs had been served. INS Newark District officials who processed the transferred detainees' cases told us that they assumed that NTAs had been served. The INS New York Assistant District Director for Investigations similarly said the New York District assumed that INS Headquarters had provided the INS Newark District with a copy of the approved NTAs when, in fact, it had not.

In October 2001, INS Eastern Region officials became aware of the case-processing problems associated with detainees transferred from the INS New York District to the INS Newark District. Beginning October 5, 2001, the INS Eastern Region detailed INS detention officers and investigators from other INS districts to help address the increased workload of the Newark District. This eventually alleviated some of the processing delays, although INS Newark District officials said it took time to work through the backlog of cases while new cases arrived at the INS Newark District.

## IV. OIG ANALYSIS

The INS does not keep a record of when the charging determination is made for aliens charged with immigration violations. This makes it impossible to determine how often the decision is made within the 48-hour time period required by federal regulations. For the same reason, it is impossible to determine how often the INS took advantage of the "reasonable time" exception to the 48-hour requirement, an exception that is based on "extraordinary circumstances."

We found that the INS did not consistently serve September 11 detainees with NTAs within its stated goal of 72 hours—only 60 percent were served within 72 hours. Until the INS removed its requirement for INS Headquarters review, the average length of time to serve the NTA was over seven days. Many detainees did not receive notice of the charges for weeks, and some for more than a month after being arrested.

One significant reason for the delay was the INS Headquarters's requirement that it review and approve all NTAs for legal sufficiency. This delayed the serving of NTAs on September 11 detainees. This was especially true for those detainees arrested in New York City but transferred to the INS Newark District. While INS Headquarters wanted to ensure the accuracy and completeness of NTAs for September 11 detainees, this temporary review mechanism delayed the process. It also produced a disconnect between the INS New York and Newark Districts because the INS New York District thought the charging documents it submitted to INS Headquarters for approval had been forwarded to the INS Newark District when it took custody of the detainees. Conversely, the INS Newark District presumed

that approved NTAs already had been served on the September 11 detainees arrested in New York City in accordance with INS procedures.

We believe the INS New York District should have exercised more diligence in ensuring that the INS Newark District was aware of which detainees had not been served with NTAs prior to their transfer. The practice of transferring detainees from the INS New York District to the Newark District after the detainees' arrests in New York City, along with the failure of the New York District to transmit required immigration documents with the transferred detainees, caused significant delays in serving NTAs on September 11 detainees housed in New Jersey detention facilities.

In addition, the increased workload experienced by the INS Newark District's Office of Detention and Removal after the terrorist attacks further compounded the delays in serving NTAs on September 11 detainees.

These delays affected the September 11 detainees in various ways. First, it postponed detainees' knowledge of the specific immigration charges they faced. Second, it affected the detainees' ability to obtain effective legal counsel given the lack of specific charges. Third, a delay in serving NTAs and accompanying documents postponed the detainees' opportunity to request bond redetermination hearings and seek release. These effects on detainees were important, given the Department's "no bond" policy for September 11 detainees and the conditions under which detainees were held, both of which we describe in more detail later in this report. We believe the INS should have made a more systematic effort to ensure that NTAs were served on September 11 detainees in a timely fashion.

## CHAPTER FOUR

## THE CLEARANCE PROCESS

This chapter examines the Department's process for clearing the September 11 aliens who were detained because of possible links to terrorism. Specifically, we examine how problems with the process significantly lengthened the time detainees spent in custody. First, we discuss the origins of the Department's directive that all September 11 detainees be held until the FBI cleared them of any connection to terrorism. Next, we examine the series of Operational Orders issued by INS Headquarters to its field offices in the weeks immediately following the September 11 attacks that sought to address the growing number of detainees arrested in connection with the PENTTBOM investigation.

We then turn to the process developed by the Department to clear the detainees of any connection to terrorism. In particular, we examine the activities of the squad created by the FBI New York Field Office that conducted most of the clearance investigations of September 11 detainees. We then describe the problems caused when the INS New York District failed to inform Headquarters of the arrest of hundreds of aliens "of interest," and the discovery of a separate list of September 11 detainees kept by the FBI New York Field Office in the weeks immediately following the terrorist attacks, a list apparently unknown to FBI and INS officials in Washington, D.C. who were attempting to coordinate all September 11 detainee cases. We also discuss the effects of detainee name checks in databases maintained by the Central Intelligence Agency (CIA). We end by examining the FBI's development of a "watch list" of potential

terrorist suspects and its process for adding and removing names from that list.

## I. "HOLD UNTIL CLEARED" POLICY

### A. Origins of Policy

Officials from the FBI and the INS told the OIG they clearly understood from the earliest days after the terrorist attacks that the Department wanted September 11 detainees held without bond until the FBI cleared them of any connections to terrorism. This "hold until cleared" policy was not memorialized in writing, and our review could not determine the exact origins of the policy. However, this policy was clearly communicated to INS and FBI officials in the field, who understood and applied the policy.

We found that the directive was communicated to the INS and the FBI by a number of Department officials, including Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues. Michael Pearson, the INS Executive Associate Commissioner for Field Operations, said that Levey called a senior INS official the week after the September 11 attacks and directed that no INS detainees should be released without being cleared by the FBI. Pearson said he also received instructions from INS Commissioner James Ziglar that none of the detainees should be released by the INS until they had been cleared by the FBI of any connections to terrorism. Pearson told the OIG that he passed these instructions along to employees at INS Headquarters's units assigned to handle September 11 detainee cases.

Similarly in the FBI, our interviews and review of documents confirm that FBI officials understood and applied the "hold until cleared" policy. For example, an October 26, 2001, electronic communication (EC) (similar to an e mail) from an FBI agent in the SIOC to FBI field offices stated that, "Pursuant to a directive from the Department of Justice, the INS will only remove individuals from [the special interest] list after the INS has received a letter from FBIHQ [FBI Headquarters] stating that the FBI has no investigative interest in the detainee."

In addition, an attorney with the FBI's Office of General Counsel who worked on the SIOC Working Group told the OIG that it was understood that the INS was holding September 11 detainees because the Deputy Attorney General's Office and the Criminal Division wanted them held. She said the Deputy Attorney General's Office took a "very aggressive stand" on this matter, and the Department's policy was clear even though it was not written.

Levey told the OIG that the idea of detaining September 11 detainees until cleared by the FBI was "not up for debate." He said he was not sure where the policy originated, but thought the policy came from "at least" the Attorney General.

A Senior Counsel in the Deputy Attorney General's Office who worked closely with Levey on immigration matters ("Senior Counsel to the DAG") stated in her response to the draft of this report that those involved in the discussion of the process, including attorneys from the INS, OIL, and the Criminal Division (including TVCS), were aware that the strategy had risks, and clearly anticipated the filing of habeas corpus petitions because of

the position the Department planned to take that any illegal alien encountered pursuant to a PENTTBOM lead should be detained until cleared by the FBI. She noted that this was "unchartered territory." On September 27, 2001, the Senior Counsel sent an e-mail to David Ayers, Chief of Staff to the Attorney General, on September 27, 2001, that discussed this "hold until cleared" policy. The e-mail described the "strategy for maintaining individuals in custody." The document attached to the e-mail, entitled "Maintaining Custody of Terrorism Suspects," begins with a "Potential AG Explanation" that states:

> The Department of Justice (Department) is utilizing several tools to ensure that we maintain in custody all individuals suspected of being involved in the September 11 attacks without violating the rights of any person. If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant. Many people believed to be involved in the attacks, however, are not present legally and they may be detained, at least temporarily, on immigration charges. As of September 27, 2001, the Immigration and Naturalization Service (INS) was detaining without bond 125 aliens related to this investigation on immigration charges.

The document then describes plans for handling bond hearings and coordination efforts among the FBI, INS, and Criminal Division to ensure that September 11 detainees would remain in custody. Levey told us this document was drafted to enable the Attorney General to provide an explanation as to how, within the bounds of the law, the Department could hold and not release aliens who were suspected of terrorism.

Other senior Department officials confirmed that the directive to hold the September 11 detainees without bond stemmed from discussions at the highest levels of the Department. Assistant Attorney General Michael Chertoff told the OIG that in the early days after the terrorist attacks the issue was discussed among the Attorney General, Deputy Attorney General, and FBI Director that detention should be sought of a charged person "if there is a link to the hijackers and we are not able to assure that the person is not a threat and there is a legal violation." Alice Fisher, a Deputy Assistant Attorney General in the Criminal Division and a participant in the SIOC Working Group, told the OIG that Chertoff told her that "we have to hold these people until we find out what is going on" and that, in some cases, they could use immigration charges to keep the detainees in custody.

David Laufman, Chief of Staff to the Deputy Attorney General, told the OIG that he recalled a meeting which INS representatives attended soon after the terrorist attacks that included a discussion of whether potential immigration violations could be "leveraged" against September 11 detainees when there was insufficient information for criminal cases. He added that it was recognized that, "if we turn one person loose we shouldn't have, there could be catastrophic consequences." He said he recalls, however, asking Levey to take whatever steps were appropriate to expedite clearance by the FBI and the CIA.

Daniel Levin, Counselor to the Attorney General, told the OIG that he could not say for certain when the clearance policy was developed or at what level. He described a "continuous meeting" for the first few months after the terrorist attacks involving the Attorney General, Deputy

Attorney General, FBI Director, and Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed.

The Deputy Attorney General told the OIG that he remembers the "decision to hold without bond" being discussed, and that he was in favor of requiring the clearance process "within the bounds of the law." He explained that the threat after September 11 was a different threat that required a different approach. He said that investigating and prosecuting could not be the focus, as it had been before the terrorist attacks, and the Department needed to aggressively protect public safety, within the bounds of the law, by disrupting and preventing further incidents.

FBI Director Mueller stated that he did not recall being involved in any discussions about the creation of the "hold until cleared" policy, although he learned about the policy later.

When asked about a "hold until cleared" policy, the Attorney General told the OIG that the Department would want to know whom the detainees were if it was getting ready to remove them. He noted the inherent difficulty involved in conducting a "clearance" process, in that clearing someone is akin to "proving a negative." He also noted that the Department does not assert that it could hold anyone "forever" without regard to a predicate offense. However, the Attorney General said he had no reluctance to do those things legally permissible to detain someone who had violated the law.

### B. Implementation of Policy

From the first days after the terrorist attacks, the INS adopted the term "of interest" to identify aliens arrested on immigration violations in connection with the September 11 investigation who needed to be cleared by the FBI of any connections to terrorism before they could be released or removed from the United States. Detainees who were not "of interest" to the FBI's terrorism investigation did not have to be cleared by the FBI and could be processed according to normal INS procedures. The FBI was responsible for determining whether an alien arrested in connection with a PENTTBOM lead on immigration charges should be further investigated. If it found further investigation warranted, then the alien was "of interest" and the FBI notified the INS of that determination. However, there were many cases where the FBI told the INS that it could not determine at the outset whether it had an interest in the alien. In cases of affirmative FBI interest or a statement that interest could not be determined, the INS treated the alien as "of interest."

Problems quickly arose upon implementation of the "hold until cleared" policy for aliens arrested on PENTTBOM leads, because the Department and the FBI did not develop clear criteria for determining who was, in fact, "of interest" to the FBI's terrorism investigation. From our interviews, we determined that, for the most part, aliens were deemed "of interest" based on the type of lead the law enforcement officers were pursuing when they encountered the aliens, rather than any evidence that they were terrorists. In the New York City area, for example, anyone picked up on a PENTTBOM lead was

deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the strength of the evidence or the origin of the lead. A PENTTBOM lead was considered any lead that was in any way connected to the World Trade Center or Pentagon investigation, or a lead that raised the specter of "suspicious activity" by an alien who might possibly be a terrorist. However, there need not be any evidence of connection to the terrorists or to the World Trade Center or Pentagon bombings for a lead to be considered a PENTTBOM lead. Any illegal alien encountered by New York City law enforcement officers following up a PENTTBOM lead—whether or not the alien turned out to have a connection to the September 11 attacks or any other terrorist activity—was deemed to be a September 11 detainee.

In a January 2002 court proceeding, the Department defined the term "September 11 detainees" as "individuals who were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them."[36]

Many of the persons arrested as part of the PENTTBOM investigation were aliens unlawfully present in the

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[36] This definition was contained in the declaration of James Reynolds, Chief of the Terrorism and Violent Crime Section in the Department's Criminal Division (the "Reynolds Declaration"), submitted by the Department on January 11, 2002, in support of the Department's summary judgment motion in connection with the case entitled Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 01-civ-2500 (D.D.C. filed Dec. 6, 2001).

United States either because they entered this country illegally or because they entered legally but remained after their authorization to do so had expired. It is unlikely that most if not all of the individuals arrested would have been pursued by law enforcement authorities for these immigration violations but for the PENTTBOM investigation.[37] Some appear to have been arrested more by virtue of chance encounters or tenuous connections to a PENTTBOM lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity.

For example, on September 15, 2001, New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. Nonetheless, they were arrested and remained detained as September 11 detainees. Another alien was arrested on September 22, 2001, because the phone company mistakenly put his phone calls home to [redacted] on the bill of a New York [redacted] office

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[37] The September 11 attacks focused renewed attention on the importance of knowing when nonimmigrant visitors enter and depart the United States. The OIG has reported previously on the INS's efforts to identify and remove nonimmigrant overstays, most recently in an April 2002 follow-up report that found the INS has made little progress to effectively address the issue. The follow-up review concluded that the INS still did not have a reliable system to track overstays, did not have a specific overstay enforcement program, and could not provide accurate data on overstays. See Follow-Up Report on INS Efforts to Improve the Control of Non-Immigrant Overstays, Report No. I-2002-006, April 2002, *available at* http://www.usdoj.gov/oig/inspection/I-2002-006/report.pdf.

and the [redacted] office called to report the "suspicious" bill. The alien was arrested, detained on immigration charges, and considered a September 11 detainee. He was not cleared until January 9, 2002. Another Middle Eastern alien was arrested because he went to a car dealership on September [redacted], 2001, and was anxious to purchase a car right away. He put down a [redacted] deposit on a car but did not return on September [redacted], 2001, for the car as he agreed he would. He was arrested on September 29, 2001 and was not cleared until April 29, 2002. Another alien was arrested because a person called the FBI a few days after the terrorist attacks to say that six to ten weeks prior, the [redacted] she hired through [redacted], who was an [redacted] male, told her that he was a licensed pilot and was saving to go to flight school in the U.S. to learn to fly commercial jets. He was arrested on September 24, 2001, and not cleared until February 12, 2002.[38]

In the days immediately following the September 11 attacks, before the clearance process was centralized in Washington, D.C., the INS could obtain an indication of "no interest" from an FBI field office and proceed to process the alien as a "regular" immigration case. In mid-September 2001, however, the Department instructed the INS that before it could treat a September 11 detainee as a "normal" immigration case, the INS needed to obtain a clearance letter from Michael Rolince, Chief of the FBI's International Terrorism Operations Section

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[38] Other examples of tenuous PENTTBOM leads that led to detainee arrests and their designation as "of interest" to the September 11 investigation were described in Chapter 2.

(ITOS) in its Counterterrorism Division.[39] According to several witnesses with whom we spoke, the FBI and the Department believed that the PENTTBOM investigation should be viewed as a "mosaic" that contained countless individual pieces of information and evidence, and field offices would not be in a position to determine if any single item was of significance to this mosaic. Therefore, it was believed that FBI Headquarters would have a broader perspective on the PENTTBOM investigation and would be in a better position to make an assessment of whether an individual alien detained in connection with a PENTTBOM lead was "of interest" to the investigation. However, as we describe below, this centralized clearance process was slow and insufficiently staffed, resulting in many detainees being held for long periods of time while no clearance investigations were being conducted.

## II. INS OPERATIONAL ORDERS

By September 17, 2001, INS agents working with the FBI on PENTTBOM leads had detained approximately 69 aliens, and 40 bond hearings were scheduled for the following week. Michael Rozos, Chief of the INS's Long Term Review Branch, told the OIG that, at the time, staff at INS Headquarters began to believe that the PENTTBOM investigation could involve the largest number of INS detainees since the Mariel boatlift in 1980.[40]

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[39] A copy of a "Rolince" clearance letter is attached at Appendix E.

[40] In 1980, a flotilla of boats carrying more than 100,000 undocumented Cubans arrived in the United States after Cuban authorities permitted a mass exodus from the Cuban port of Mariel. The influx of aliens put a tremendous strain on federal immigration and detention facilities in south Florida and elsewhere across the country.

In response to the increasing number of aliens being detained as a result of the PENTTBOM investigation, officials at INS Headquarters developed a series of procedures to ensure that the detainees' cases were handled uniformly. INS Headquarters officials told the OIG they also wanted to ensure that they had complete information on each September 11 detainee, because senior Department officials were requesting regular updates on the status of the cases. Consequently, Pearson, the INS Executive Associate Commissioner for Field Operations, disseminated 11 Operational Orders to INS field offices regarding the handling of September 11 detainees during a 12-day period beginning on September 15, 2001.

These Operational Orders varied the normal procedures for handling INS detainees. Routine immigration cases are usually handled by INS district offices and normally do not come to the attention of INS Headquarters officials. However, even before September 11 the National Security Unit (NSU) in INS Headquarters handled immigration cases involving terrorism and war crimes. Prior to September 11, the NSU consisted of three INS agents stationed at INS Headquarters and three agents working at the FBI's ITOS at FBI Headquarters. Among other duties, the NSU coordinated the INS's participation in the New York JTTF.

The Operational Orders created a different track for aliens detained in connection with the PENTTBOM investigation. After the September 11 attacks, Pearson designated the NSU as the INS's intake unit for all immigration detainees designated as "special interest" cases. In the weeks after the attacks, the NSU received information, primarily by facsimile, from INS field offices across the country that had detained aliens in connection

with the PENTTBOM investigation. Daniel Cadman, the head of the NSU, told the OIG that the NSU consulted with the FBI to determine whether detainees were "of interest." If the FBI notified the INS that the detainee was "of interest," or if the FBI could not state whether or not it had interest, the INS labeled the detainee as a "special interest" case and forwarded the appropriate documentation to its Custody Review Unit (CRU). This unit, created after September 11, 2001, was the unit at INS Headquarters responsible for managing the September 11 detainees' immigration cases.

Pearson's Operational Orders described these INS procedures. His first order required that "information relating to investigating events or actions taken in [September 11] cases should be relayed immediately—repeat, immediately—to Headquarters NSU, with concurrent notification to the appropriate regional office." Pearson told the OIG that he did not want INS field offices handling any September 11 cases without INS Headquarters's full involvement and approval. A second order, sent later that same day, set forth the specific documents field offices were required to send to the NSU for each case.

Pearson's third order, issued September 16, 2001, directed INS field offices to obtain approval from INS Headquarters before issuing any charging documents for September 11 detainees. In addition, the order instructed INS agents working with the FBI on the terrorism investigation to "exercise sound judgment" in deciding whether to arrest illegal aliens they encountered and generally to do so only if the FBI had "an interest" in the aliens.

A seventh operational order from Pearson on September 18, 2001, stated that the FBI had issued an EC to FBI field offices that included the following language:

> As of early this morning, INS has sixty-one suspect foreign nationals in their custody for administrative violations of the Immigration and Nationality Act. In order to ensure continued custody of these individuals until an informed decision has been made regarding their potential as criminal suspects/material witnesses, it is essential that all field offices immediately make contact with their respective INS counterparts and articulate IN WRITING why these detained individuals are of significance. In turn, those submissions will be used by INS to argue for continued custody in imminent bail recommendation hearings as well as by the Criminal Division for possible preparation of material witness warrants.

Pearson's order instructed INS field offices that participated in these arrests to communicate to their local FBI field office the urgency of receiving written assessments of the detainees' investigative significance because bond re-determination hearings were forthcoming for many of the detainees.[41]

A variety of INS, FBI, and Department officials who worked on these September 11 detainee cases told the OIG that it soon became evident that many of the people

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[41] INS District Directors set the initial bond for aliens charged with immigration offenses. Because of the Department's blanket "no bond" policy for September 11 detainees, District Directors refused bond for these detainees. A detainee not satisfied with the District Director's initial bond determination could request a bond re-determination hearing before an Immigration Judge. We discuss in more detail bond issues and bond hearings in Chapter 5.

arrested during the PENTTBOM investigation might not have a nexus to terrorism. To address this concern, Pearson issued an order on September 22, 2001, the tenth in the series, which addressed the responsibilities of INS agents who were participating in joint operations with the FBI when they encountered illegal aliens. The order instructed INS field agents to "exercise sound judgment" in determining whether circumstances require immediate arrest and detention, and urged INS agents to limit arrests to those aliens in whom the FBI has an "interest" given the "Servicewide resource implications" of the September 11 attacks. The order reiterated that field offices were required to "immediately notify" the NSU and INS District Counsel of any arrests and to provide information regarding the "degree of interest expressed by the FBI field office, if known."

The order stated that "[n]o charging documents will be issued in any such case until the facts and circumstances of the case have been reviewed and the documents approved jointly by Headquarters National Security Unit and Headquarters Counsel (National Security Law Division, 'NSLD')." In instances where the person was already under arrest or where the detainee's connection to terrorism is unknown, the order said, "we encourage and expect forwarding of cases for review and consideration—this is one reason we require the field to advise us of expressions of interest by the FBI." Conversely, the order discouraged INS field offices from submitting cases that are "clearly of no interest in furthering the investigation of the terrorist attacks of September 11th."

In addition to issuing a series of Operational Orders, INS Headquarters developed standard operating procedures for processing September 11 detainees. The pro-

cedures were intended to keep INS Headquarters informed of INS field activities related to the terrorism investigation, to enable the INS to maintain an accurate list of all INS detainees in whom the FBI had an interest, and to ensure that the INS did not inadvertently release a detainee in violation of the Department's instructions to hold all September 11 detainees until cleared by the FBI. Under normal circumstances, INS Headquarters officials would not have reviewed charging documents in "routine" immigration cases.

## III. THE CLEARANCE PROCESS

Department officials told the OIG that they initially believed the FBI would be able to clear, relatively quickly, aliens arrested in connection with a September 11 lead and who were "of interest" to the FBI's PENTTBOM investigation. Many said they thought the clearance process generally would take only a few days for the majority of the aliens arrested on PENTTBOM leads. At most, they expected the process would take a few weeks to clear aliens arrested on PENTTBOM leads but who had no additional indications of a connection to terrorism.

For example, Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division, told the OIG that he believed many clearances could be done "within a few days." In his estimation, the clearance process involved a check of Government databases—including those at the CIA—and an evaluation by the FBI of all investigative information that had come to light. As late as the summer of 2002, other Department officials told the OIG that they were under the impression FBI clearances were completed in only a few days. The Attorney General stated that he did not recall hearing any complaints about

the timeliness of the clearance process or a lack of resources dedicated to the effort to clear detainees.

The belief that the clearance process would occur quickly was inaccurate. As we describe below, the FBI cleared only 2.6 percent of the 762 September 11 detainees within three weeks of their arrests. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days.

### A. Determining Which Aliens Would be Subject to the Clearance Process

As described above, the INS tried to hold without bond any alien arrested on immigration charges in whom the FBI expressed an interest, or any alien in whom the FBI's interest was undetermined. If the FBI could not state whether it had an interest in a particular detainee (i.e., the level of interest was "undetermined" or "unknown"), then the INS treated the case as if it was "of interest" to the FBI. For example, Daniel Cadman, the head of the INS's NSU, said that INS Executive Associate Commissioner Pearson instructed him that, absent a clear written statement to the contrary from Rolince, the ITOS Chief in the FBI's Counterterrorism Division, any aliens arrested in connection with the PENTTBOM investigation should be considered "of interest."

Kenneth Ellwood, the INS Philadelphia District Director who was brought to INS Headquarters to assist in the detainee operation, told the OIG that the FBI created difficulties by not giving the INS clear signals about who should be on the "special interest" list. Ellwood said the FBI did not have enough agents to run down all the leads on many of the aliens to the point where they could feel comfortable about making an initial determination as to

who was "of interest." The FBI attorney assigned to the SIOC Working Group said that the FBI did its best with regard to "interest" classification determinations, but she acknowledged that the pace of information from FBI field offices about detainee cases was slow. Others told us they believed the FBI did not provide sufficient support to the clearance process. Nonetheless, given that the FBI was leading the PENTTBOM probe, the INS deferred to FBI assessments about who was "of interest" to its investigation.

We also found that the classification issue was not handled uniformly nationwide. In the New York City area, the INS forwarded case files for all aliens it arrested to the FBI New York Field Office for clearance. We found that neither the FBI nor the INS in New York attempted to distinguish between aliens encountered coincidentally to a PENTTBOM lead and those who were the subject of a PENTTBOM lead. In contrast, INS offices in jurisdictions outside of the New York City area used the procedures in Pearson's Operational Orders described earlier in this chapter to try to screen out cases in which illegal aliens showed no evidence of any connection to terrorism. Officials at INS Headquarters told the OIG that this "vetting process" was somewhat helpful in ensuring that only meritorious cases were classified as September 11 detainees and, consequently, held without bond and required to undergo clearance by the FBI. However, this "vetting process" was not applied in New York City.

Several Department officials involved in the terrorism investigation also told the OIG that it soon became clear that many of the September 11 detainees had no immediately apparent nexus to terrorism. As a result, the

terrorism investigation soon narrowed its focus to a few of the individuals who were detained, not the vast bulk of the aliens arrested in connection with PENTTBOM leads. For example, David Kelley, the Deputy U.S. Attorney for the Southern District of New York who immediately after the September 11 attacks came to Washington, D.C., to help supervise the investigation of the attacks, told the OIG that within one to three days of the attacks prosecutors were focusing on individuals of "genuine investigative interest," such as a person whose telephone number was linked to one of the hijackers or a person who lived in a building near a location of high interest to the terrorism investigation, as opposed to aliens identified by the FBI simply as "of interest." Other Department officials acknowledged to the OIG that they realized that many in the group of September 11 detainees were not connected to the attacks or terrorism in general.

Nevertheless, the Department required the FBI to clear all September 11 detainees before they could be released—a policy supported uniformly by FBI staff interviewed by the OIG. Many witnesses told the OIG that no one wanted to prematurely release a September 11 detainee only to find out later that the person was a terrorist who posed a threat to the United States. Yet, as we next describe, the FBI clearance process for September 11 detainees was slow and not given sufficient priority, which resulted in most detainees being held for months before they were cleared.

### B. FBI Field Office Role in the Clearance Investigation

The responsibility for clearing an individual September 11 detainee of a connection to terrorism fell, at least initially, to the FBI field office in whose jurisdiction the

alien was arrested.[42] The FBI New York Field Office bore the brunt of this requirement because almost 60 percent of the 762 September 11 detainees were arrested in the New York City area. The FBI in New York City created a special squad called "I-44A" to assist FBI agents and the JTTF in following up on some of the more than 20,000 PENTTBOM leads covered by the FBI New York Field Office in the year following the terrorist attacks. This unit also was given the responsibility for clearing aliens arrested in connection with PENTTBOM.

Members of the I-44A squad told the OIG that after an alien's arrest in connection with a PENTTBOM lead, the INS agent forwarded a copy of the detainee's A-File to the I-44A squad for its use during the detainee's clearance investigation. After receiving the A-File, paralegals working in the I-44A squad began a series of computer checks to examine the detainee's background. These included checks of Department of Motor Vehicle records, the FBI's National Criminal Information Center database, Drug Enforcement Administration's databases, databases with information on authorized federal wiretaps, Federal Aviation Administration databases, State Department databases, INTERPOL databases, and searches of as many as nine other databases. While we were told that the FBI paralegals generally processed these database checks, if any "positive" information came back on an alien it was an FBI agent's responsibility to

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[42] As discussed later in this chapter, FBI officials centralized the detainee clearance process at FBI Headquarters in October 2001. After this time, agents in FBI field offices continued to conduct clearance investigations of September 11 detainees, but FBI Headquarters officials coordinated CIA checks and eventually issued the formal clearance letters.

review that information and determine whether additional investigation was necessary.

Supervisors in the I-44A squad said they tried to assign each detainee's clearance investigation to the FBI agent who was present at the detainee's arrest. In some instances, however, this was not possible because the alien was arrested by other JTTF members or local law enforcement. In these cases, the clearance investigation was assigned to an FBI agent in the I-44A squad. FBI agents assigned detainee investigations were given a detailed set of instructions outlining the steps necessary to clear a detainee. In addition to conducting computer database and fingerprint checks, the agents were instructed to obtain from the detainee items such as identification documents and cell phone, and to run checks on all names, addresses, and telephone numbers obtained from those items. The clearance instructions also suggested interviewing landlords or employers "if necessary."

FBI agents conducting clearance investigations also were required to interview detainees unless the agents determined that initial interviews with the detainees at the time of their arrests adequately addressed the required topics. However, the list of 31 issues FBI agents were required to cover during their review was so comprehensive that in all 28 New York cases the OIG reviewed, FBI agents had to re-interview detainees during the clearance investigations. None relied solely on the detainees' arrest interviews for the clearance investigation. Moreover, the instructions directed FBI agents to interview detainees after I-44A paralegals had completed computer checks and clearance investigations. Given the required interview topics, the FBI agents' questions often

elicited names, telephone numbers, and addresses that required additional investigation.

The OIG's review of 28 I-44A squad clearance files revealed that for many detainees the field work was rather straightforward—a few interviews in addition to the computer checks. In other cases, however, the clearance process required a substantial amount of investigative work for FBI agents.

The computer checks and detainee interviews were considered only the first level of clearance investigation. According to the instructions, if a detainee was "determined to be involved or associated with hijackers or terrorist organization" based upon the FBI agent's initial work, the agent was required to refer the matter to another FBI unit for additional investigation. In cases not referred for additional investigation, the agents drafted a summary document describing the clearance investigation and including their recommendation as to whether the detainee exhibited any connections to the September 11 attacks or terrorism in general. FBI agents sent the reports to Kenneth Maxwell, the Assistant Special Agent in Charge of the FBI New York Field Office, who, among his many other duties in the weeks immediately after the terrorist attacks, made the ultimate determination for the FBI New York Field Office regarding clearance of September 11 detainees.

FBI agents assigned to the I-44A squad told the OIG that obtaining final approval from Maxwell on a clearance investigation often took a significant amount of time because of his hectic schedule. Agents said they would gather ten or more cases before approaching Maxwell to conduct reviews and, in most instances, they said Maxwell would sign clearance letters for all of the detainees.

However, FBI agents said sometimes Maxwell would return a case to them for further investigation or would refer the case to the JTTF.

Until October 24, 2001, the FBI New York Field Office believed that no additional checks, other than its clearance process, were required to clear a detainee. On October 24, however, officials at FBI Headquarters notified its field offices that FBI Headquarters, rather than individual field offices, would be responsible for coordinating CIA "name checks" on all detainees (discussed in more detail below). The remainder of the tasks associated with the clearance investigation, including interviews of the detainee and any other witnesses as well as checks of law enforcement databases, remained the responsibility of FBI field offices.

### C. CIA Name Checks

As part of the clearance process, the Department decided to ask that the CIA also conduct name checks on all September 11 detainees. The FBI centralized the CIA checks at FBI Headquarters because of concerns that requests from individual FBI field offices would flood the CIA and complicate its ability to respond. Prior to the September 11 attacks, FBI field offices across the country used a computer system to check if the CIA had information on a particular person. If that search was positive, or if the field offices wanted a more in-depth search, they contacted the CIA directly for information on a particular person. Similarly, the INS's NSU would send its inquiries directly to the CIA's Office of General Counsel (OGC), the point of contact for these informational requests.

An attorney in the CIA OGC explained to the OIG that prior to September 11, after receiving an inquiry from the FBI or INS, CIA OGC staff would send queries to the various CIA branches that might have pertinent information. CIA OGC staff would gather all relevant files and notify the FBI or INS that the information was available for review. AN FBI analyst or INS attorney would then review the CIA information. While this process was labor intensive and time consuming both for the CIA and the agency seeking the information, the CIA OGC attorney said that it had worked well in the past because the number of requests before September 11 was relatively small.

After the September 11 attacks, this system no longer worked because of the large volume of requests from the FBI. For example, a November 6, 2001, letter from the CIA OGC to an FBI special agent assigned to the SIOC Working Group explained that files of 42 individuals had been collected and were awaiting review. The letter also noted that the OGC has limited space in its offices for file storage and requested that the files be reviewed promptly.

In late October 2001, because of concerns that the checks which could be done from FBI offices were not adequate and because of the volume of requests for name checks sent directly to the CIA, FBI Headquarters centralized the process and required that all contact with the CIA concerning September 11 detainees be routed through FBI Headquarters. The FBI New York Field Office received an EC dated October 24, 2001, from an FBI agent assigned to the SIOC Working Group that stated:

> Effective with this communication, all CIA name checks will be conducted by FBIHQ. Therefore, once FBI New York has determined that there is no investigative interest in a detainee, FBI New York should send an EC to [the FBI] requesting that CIA name checks be conducted. Once [the FBI] has received the results of the CIA name checks, and a determination is made that there is no information of lead value, [FBI Headquarters] will advise FBI New York of this fact so that FBI New York can provide INS New York with a no investigative interest letter. FBI New York should not provide no interest letters to INS New York without CIA name checks being conducted.

Consequently, as of October 24, 2001, FBI Headquarters took over responsibility for the CIA name check portion of the detainee clearance process. After that date, the FBI New York Field Office did not issue clearance letters until it heard from FBI Headquarters that the CIA name check had not discovered any negative information associated with a September 11 detainee.

## IV. TIMING OF CLEARANCES

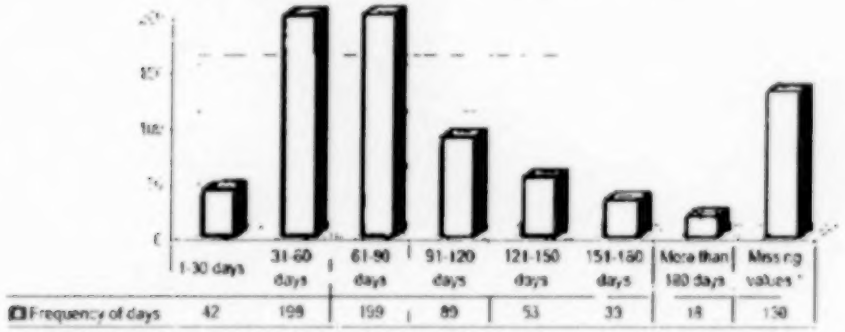
We found the FBI took a long period of time to clear September 11 detainees. In an effort to examine the timeliness of the clearance process, the OIG analyzed information detailing the date detainees were arrested and the date FBI Headquarters issued final clearance letters.

The FBI cleared less than 3 percent of the 762 September 11 detainees within three weeks of their arrest. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days, and the median was 69 days. Further, we found that

more than a quarter of the 762 detainees' clearance investigations took longer than 3 months. See Table 3 and Figure 7.

| Table 3 | |
|---|---|
| **Number of days from arrest to FBI HQ clearance:** | |
| Average | 80.1 |
| Median | 69 |
| Minimum | 8 |
| Maximum | 244 |
| Missing values* | 130 |

Figure 7
Number of Days from Arrest to FBI HQ Clearance




*Arrest date or FBI Headquarters clearance date missing

## V. DELAYS IN THE CLEARANCE PROCESS

A variety of factors contributed to the discrepancy between the time frames envisioned by Department officials overseeing the detainee clearance process and the actual time it took to clear detainees. Some of the delay was attributable to a Department decision to include all New York City area arrests in the pool of detainees who needed FBI clearances. Another reason for the delay

was a shortage of agents at FBI field offices available to conduct detainee clearance investigations, given the many demands on the FBI in the fall of 2001 and early 2002. We concluded that the delay was not significantly affected by CIA response time on name checks, as some officials claimed to the OIG. Rather, a larger part of the delay was because of the length of time it took for FBI Headquarters officials to review CIA responses to the name checks.

### A. Inclusion of New York Arrests on the INS's "Special Interest" List Requiring Clearances

Despite the elaborate system developed by INS Headquarters to identify and process aliens arrested in connection with the PENTTBOM case, INS officials in Washington, D.C. discovered—almost by accident—a large number of "special interest" cases not included on its Custody List that required clearances before release. By the end of October 2001, officials at INS Headquarters determined that the FBI's New York Field Office was maintaining a separate list of approximately 300 detainees arrested in connection with the PENTTBOM investigation, most of whom were not on the INS Headquarters's Custody List. These aliens were arrested on immigration charges in the New York City area by INS agents working with the New York JTTF. The names had been provided to the FBI's New York Field Office, but had not been reported to the INS NSU as required by the Operational Orders issued by INS Headquarters, which we described previously in this chapter. By the time officials at INS Headquarters became aware of these additional detainees, many already had been detained for several weeks.

During discussions about what to do about the detainees on this separate New York list, officials at the INS, FBI, and the Department raised concerns about, among other things, whether the aliens had any nexus to terrorism. However, in the end, the New York list was combined with the INS Headquarters's Custody List because of concerns that without further investigation of these aliens prior to removal, the FBI could unwittingly permit a dangerous individual to leave the United States.

### 1. Background to the New York Custody List

As noted above, unlike elsewhere in the country, where detainee cases were individually assessed for placement on the national INS Custody List, the FBI New York Field Office decided that all aliens arrested in connection with a PENTTBOM lead would be investigated fully, regardless of the factual circumstances of their arrests. In the first weeks after the terrorist attacks, FBI officials in New York City created a list of every alien arrested in connection with a PENTTBOM lead, regardless of the circumstances of the arrest. New York FBI and INS officials agreed that the INS New York District would detain all of the aliens without bond until the FBI had a chance to fully investigate and clear each one. As discussed previously, prior to centralization of the clearance process at FBI Headquarters in October 2001, aliens were removed from New York's custody list only after receiving a clearance letter signed by Maxwell, the Assistant Special Agent in Charge of the FBI New York Field Office.

In early October 2001, an INS attorney in Newark forwarded INS Headquarters case names that the INS Newark District believed were on the INS Custody List but that in fact were not on the list. This led INS rep-

resentatives to the SIOC Working Group to realize that the INS in New York and Newark had not been reporting all PENTTBOM-related cases to Headquarters, as required by the Operational Orders.

INS officials convened a meeting on November 2, 2001, to discuss why its New York office had failed to report the names contained on this separate list of "special interest" detainees, given efforts at INS Headquarters to ensure that it would be aware of all "special interest" cases. According to notes from the meeting, the INS New York Assistant District Director for Investigations explained that the FBI could not determine its interest in a large group of aliens arrested in connection with the PENTTBOM probe. Therefore, the INS New York District had read Pearson's Operational Order 10 to mean that such cases not be forwarded to INS Headquarters.[43] During the meeting, Pearson asked whether the aliens in question had been initially held without bond, and he learned that they had been.

The OIG attempted to determine why the New York FBI and INS offices failed to keep FBI and INS Headquarters informed of all aliens who would be subject to the clearance investigation requirement. A variety of witnesses told the OIG that federal law enforcement organizations in New York City have a long history of taking actions independent of direction from their Washington, D.C., headquarters. Several witnesses pointed out that the U.S. Attorney's Office in the Southern Dis-

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[43] Operational Order 10, issued by Pearson to all INS field offices on September 22, 2001, instructed INS field agents to exercise "sound judgment" in determining whether circumstances required immediate arrest and detention of aliens, and urged the agents to limit arrest to those aliens in whom the FBI had an interest.

trict of New York and the FBI's New York Field Office have coordinated many major terrorism investigations in the United States, including the 1993 World Trade Center bombing and the African embassy bombings. Witnesses told the OIG that the U.S. Attorney's Office and FBI's New York Field Office were accustomed to functioning in a highly independent manner with little oversight from officials in Washington, D.C.

Discovery of a large group of PENTTBOM-related detainees who had to be cleared and who were unknown to INS Headquarters until mid-October 2001 presented a host of problems, and several persons told the OIG that the INS aggressively sought to prevent wholesale incorporation of the New York list of approximately 300 detainees into its "INS Custody List." By this time, INS officials already were concerned about the slow pace of FBI clearances even though the SIOC Working Group was only dealing with 200 detainee cases. Moreover, INS officials were concerned about such a merger's impact because the New York list indicated that 85 cases were "unassigned," meaning no FBI agents were working clearance investigations for these detainees. In addition, contemporaneous notes indicate that at least one INS Headquarters official was concerned about how it would look when the Department's statistics regarding the number of September 11 detainees doubled overnight.

### 2. Merger of Lists

On October 22, 2001, the Senior Counsel in the Deputy Attorney General's Office who worked on immigration matters, an attorney from the Terrorism and Violent Crime Section (TVCS), two attorneys from the Department's Office of Immigration Litigation (OIL), an attorney from the FBI's OGC, and the Unit Chief of the FBI

ITOS staff met with INS staff to discuss the problems presented by the New York list. The INS sent multiple representatives to the meeting, including Victor Cerda (Commissioner Ziglar's Chief of Staff), INS Deputy General Counsel Dea Carpenter, and others. Notes taken at the meeting by an INS attorney reflect that INS officials argued vehemently against subjecting all September 11 detainees on the New York list to the full FBI clearance process because, among other things, the clearance investigations were not being expeditiously completed.

According to meeting notes, Carpenter also stated that the Department might be subject to "Bivens liability" if it did not release the New York detainees in a timely manner.[44] Another person at the meeting commented that the INS could not hold the detainees "forever." One of the INS attorneys at the meeting who was in the SIOC Working Group noted that the recent reassignment of a helpful FBI special agent had brought the information flow from the FBI to the INS to a "grinding halt," further delaying the clearance process. Among the issues raised at the meeting was the Department's requirement that CIA checks be completed on all detainees before they could be released.

A similar group held a follow-up meeting at the FBI's SIOC on November 2, 2001, to continue discussing what to do about the separate New York list. Associate Dep-

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[44] In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that damages may be obtained for injuries stemming from violation by a federal official of a person's Fourth Amendment right to be free from unreasonable search and seizure.

uty Attorney General Levey attended the meeting, along with representatives from INS OGC; Cadman, the Director of the INS's NSU; Cerda; and attorneys from the INS's Bond Unit, OIL, and TVCS, among others. Raymond Kerr, the Supervisory Special Agent in charge of the I-44A squad in the FBI's New York Field Office, participated by speakerphone. Contemporaneous notes taken by participants and subsequent OIG interviews indicate that the meeting was very contentious. According to the notes, INS officials expressed a wide range of concerns during the meeting, including the fact that FBI clearance checks on the detainees were not timely, that the INS had insufficient evidence for upcoming bond hearings, and that Immigration Judges already had ordered certain September 11 detainees to be removed from the United States. When an INS official complained that the INS could not continue to hold the detainees, Levey responded that the INS needed to be patient. According to the notes, Levey said that he did not expect INS to wait months for the results of the clearance checks, but that the INS could wait four to five days for the CIA checks. The group also discussed resource problems at the FBI and INS, as well as ways to improve the flow of information between the two agencies.

According to the notes of the meeting, FBI Supervisory Special Agent (SSA) Kerr said the time frame for assigning a September 11 detainee case to an FBI agent for a clearance investigation was a few days. He urged Levey to direct that all the detainees on the New York list continue to be held without bond until cleared. Notes taken by a participant at the meeting summarized the conflict: "In NY, all people FBI picks up on pent-

bom [sic] get held no bond. Everyone else, INS exercises a little discretion, looking for a scintilla of evidence, to justify no bond."

Cerda argued that the New York list should not be added wholesale to the INS's Custody List. He explained that the INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees. He stated that, for the most part, detainees' placement on the list meant they did not get off for a long time. During the meeting, at least one INS official suggested dispensing with CIA checks for detainees who otherwise had been fully cleared by the FBI. Levey told the group that the Criminal Division favored the CIA checks and that he would need to check to see if any detainees could be released without the CIA check.

At the conclusion of the meeting, Levey decided that all the detainees on the New York list would be added to the INS Custody List and held without bond. In explaining his decision later to the OIG, Levey said he wanted to err on the side of caution so that a terrorist would not be released by mistake. He also stated that he had received a commitment from the FBI to "expedite" its investigation of everyone on the list, and a promise that the FBI would "analyze" all the detainees within one or two weeks. The FBI OGC attorney present at the November 2 meeting said she does not recall making, or hearing Kerr make, such a commitment. Kerr told the OIG that, while present at the November 2 meeting, he may well have committed to assigning the case within a short time frame but he does not recall making a commitment to expedite all the cases or analyze all the cases within two weeks. The notes of this meeting provided to

the OIG by INS and TVCS officials contain mention of Kerr's commitment to assign the "unassigned" cases to agents within a few days, but make no mention of a commitment to "expedite" the investigations or of any promise to "analyze" the cases within one to two weeks. According to contemporaneous notes from the meeting, Cerda stated at the end of the meeting that the "INS position is that we don't want to 'no bond' the NY list. But we will comply with the no bond policy."

As a result, on November 2, 2001, the INS Custody List contained 185 active INS cases and 34 inactive cases (meaning 34 detainees had been cleared). On November 5, 2001, after the New York cases were added, the INS Custody List contained 440 active and 41 inactive cases. The addition of the New York cases to the INS Custody List made the task of removing people from the list "unmanageable," according to one INS participant at the meeting, and it clearly had the effect of slowing the clearance process.

### B. Delays in the Field Portion of the Clearance Investigation

According to members of the I-44A squad, reassignment of FBI agents to other duties contributed to delays in detainee field investigations. Kerr, the Supervisory Special Agent in charge of the I-44A squad, said he consistently requested additional resources for clearance investigations but was told they were unavailable, and that he had been given all the resources that could be spared, given the many priorities assigned to the FBI. For example, during the fall of 2001 and the spring of 2002, the FBI Newark Field Office had been assigned a substantial amount of work in connection with the an-

thrax investigation and the Daniel Pearl kidnapping in Pakistan. The FBI Philadelphia Field Office had responsibility for the Fresh Kills landfill on Staten Island, where officials were examining debris and remains from the World Trade Center. In addition, FBI agents were assigned to investigate the crash of an American Airlines flight in Queens on November 12, 2001, while other agents were sent to Salt Lake City in early 2002 to help with security at the Winter Olympics.

In addition, during some clearance investigations, FBI agents uncovered information that Maxwell, the Assistant Special Agent in Charge of the New York Field Office, thought warranted review by the New York JTTF. In those cases, FBI agents transferred the files to the JTTF. The documents we reviewed showed that the files often were not returned to the I-44A squad for many months.

Moreover, the method by which the FBI managed the clearance investigation process affected the timeliness of these investigations. According to the members of the I-44A squad, once the FBI investigated a lead and the INS arrested an individual in connection with that lead, agents generally moved on to the next lead rather than taking time to investigate or clear the person arrested. Furthermore, we found that FBI Headquarters did not impose deadlines on squad members or other FBI agents to complete September 11 clearance investigations.

We also found instances in which I-44A squad supervisors did not prioritize clearance investigations, even in response to ECs from FBI Headquarters alerting the FBI New York Field Office about upcoming detainee bond hearings. FBI agents working in the I-44A squad

said they never were told about any time limits with respect to the INS's authority to detain these aliens without bond. While an FBI member of the SIOC Working Group was designated to serve as liaison to the I-44A squad, that person changed in mid-November 2001. The INS New York District liaison to the I-44A squad changed frequently, according to the squad supervisor. Consequently, the flow of information from the SIOC to the I-44A squad and from the FBI New York Field Office to INS Headquarters staff concerning the status of individual detainee clearances was, in the INS's view, sporadic at best.

### C. CIA Name Checks

Several FBI and INS officials interviewed by the OIG expressed frustration with the CIA checks required by FBI Headquarters. For example, Kerr told the OIG that he believed his office had the ability to conduct an adequate clearance investigation using its own contacts at the CIA and its long-standing experience investigating al Qaeda and other related terrorist groups. Within the INS, the frustration came not so much from who handled the CIA checks but rather how long it took.

According to INS officials, the FBI told them that the CIA name check played a major role in delaying completion of detainee clearance investigations for September 11 detainees. Cerda, the INS Chief of Staff, told Levey that the CIA name checks were causing delays in the clearance process. As a result, Levey attempted to facilitate an expedited CIA name check that would meet the Department's desire to ensure that dangerous individuals were not released, but would not cause unreasonable delay.

Consequently, representatives from the CIA, FBI, INS, and the Department met at the FBI SIOC on October 23, 2001, and agreed that an expedited name check would be sufficient to meet the FBI's needs. On October 29, 2001, the CIA's Litigation Division Chief sent a draft letter to Levey that outlined the new, expedited process. The Litigation Division Chief explained that the FBI would send a cable to the CIA with detainee names, in priority order, together with required identifying information. The CIA agreed to check its main database for each name and provide copies of the search results to the FBI, including a summary of any "derogatory" information, on an "expedited basis." Levey said he was told this expedited name check could be accomplished in 48 hours. An FBI agent in the SIOC Working Group told the OIG that he was told the CIA checks should take only a "few days."

This check of the CIA's main database was a less thorough search than had been pursued in the past at CIA Headquarters. The new process required only that the raw information be summarized by the CIA, rather than requiring the FBI to review the files itself. Under the plan, FBI and Criminal Division attorneys would review the initial CIA summary information and send the CIA a letter identifying any individuals for whom they wanted the CIA to conduct a broader database and records search. The letter from the CIA stated that the more thorough search, which would be initiated only upon receiving a specific request, in most cases would take approximately two weeks.

Yet, despite the new, expedited procedures, several FBI and Department officials we interviewed stated that there continued to be a substantial delay in the CIA's

response to requests for name checks on the September 11 detainees. Several officials argued this was a big part of the reason why the clearance process for September 11 detainees continued to take so long. According to CIA officials, after the Department and the CIA developed the expedited name check process, the CIA's initial checks for September 11 detainees were completed within approximately eight days. However, our analysis did not substantiate this claim.

First, in a number of instances, we found the CIA's response was delayed due to a failure by the FBI or INS to submit complete information. We found multiple instances in which the CIA responded that it was waiting on the INS Form I-213 (the INS's arrest report) in order to complete the check.[45] CIA staff interviewed by the OIG noted that the cables received from the FBI often did not contain adequate identifying information on the detainees, thereby making the searches more difficult and ultimately less helpful. For example, a November 26, 2001, letter from the CIA OGC to Levey and the Chief of the FBI OGC's National Security Law Division explained that the FBI name check requests "do not provide all of the information upon which we agreed during our meeting." The letter explained that the information from the INS Form I-213 allowed the CIA to more quickly discard nonresponsive hits on similar names, thereby improving the response time. The attachments to the letter demonstrated that the FBI had failed to include information from the INS Form I-213, as agreed, and had also failed to prioritize the names.

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[45] A blank copy of Form I-213 is attached as Appendix F.

Second, we found that the substantial delays in many of the September 11 detainee clearance investigations were attributable to delays at FBI Headquarters, not because of delays in CIA name checks. In many cases, the OIG found that the CIA provided the FBI with the results of its name check months before FBI Headquarters cleared the detainee. The OIG's review of 54 detainees' files showed that the CIA was not responsible for clearance delays.[46] In these 54 cases, the CIA responded in just over 2 weeks on average. In 18 of 54 cases, the CIA responded within 8 days. While these times slightly exceeded the time frame the Department anticipated during discussions at the October 23, 2001, SIOC meeting, the response times do not seem unreasonable, given that the Department sent up to 190 names to the CIA at one time.

In contrast, we found that the FBI took months to analyze the information after receiving a response from the CIA. In 36 of the 54 detainee cases in our sample, the records reflect an average of 54 days between when the FBI received the CIA name check information and when it cleared the detainees. In all 36 of these cases, the aliens ultimately were cleared. In 14 of these 36 cases, the CIA had responded that either there were no records of the individuals in its databases or the information they had was "not identifiable" with the detainees.[47] In 22

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[46] The OIG sample consisted of 54 detainees from the INS Custody List who were identified by the INS as having been held more than 90 days as of January 23, 2002.

[47] According to an FBI analyst who reviewed the CIA name check results at FBI Headquarters, "not identifiable" meant that "based on information available, it cannot be determined if the subject is, in fact, identical to CIA file references."

cases, the FBI received some information but deemed it "not identifiable" with the detainees. In the remaining 18 of the 54 cases, we were unable to determine the time it took to analyze this information, due to insufficient data in the file.

In most instances, we found that Rolince, the ITOS Chief in the FBI's Counterterrorism Division, issued the detainee's clearance letter shortly after receiving an EC from the Supervisory Special Agent assigned to evaluate the CIA information that affirmed there was no identifiable CIA information on the detainee. Consequently, it appears that failure by the FBI to provide sufficient resources to review the CIA name check results in a timely manner significantly delayed the issuance of detainees' clearance letters.

The FBI OGC attorney assigned to the SIOC Working Group explained to the OIG that she recognized that she and her fellow OGC attorneys could not evaluate the CIA cables themselves, because they lacked the expertise to do so, and the personnel in the SIOC assigned to the detainees did not have adequate resources to handle the analysis. She alerted her superior, FBI General Counsel Larry Parkinson, who contacted the Deputy Executive Assistant Director, Tim Caruso. Caruso then contacted the Chief of the National Domestic Preparedness Office, Tom Kinnally, which was part of the ITOS. Kinnally assigned two SSAs from that unit to assist with and oversee the analysis of the CIA information. One of the SSAs told the OIG that, at the time, every member of her unit was working on a "critical" assignment, including work related to the anthrax investigation. She said she and the other SSA were assigned to do the CIA checks full time beginning in late November 2001, but

later in December they also were assigned to work on the creation of a document exploitation unit. Beginning in approximately January 2002, 2 special agents were detailed to the CIA name check project for 30 days at a time. While this provided some help, it also required new agents to be trained on the project every month.

Moreover, we found that these resources were insufficient to permit the group to analyze the CIA information in a more timely manner for a number of reasons. First, according to one of the SSAs assigned to the project, the volume of cases was simply too great. One of the FBI requests to the CIA for information contained the names of 190 detainees. Second, the SSA pointed to many technical difficulties and "growing pains" they faced when they first started in late November 2001. For example, they had to find a person who had access to and was trained on the computer system that contained many of the documents they needed. According to the SSA, it took "several weeks" to get things in place and running. Third, many of the people working on this project were not focused exclusively on this task, due to the many demands on the FBI. Finally, some of the cases required contacting FBI offices overseas or other agencies, which took time, especially because the FBI offices in the Middle Eastern countries also were over-burdened at the time.

The SSA also stated that, despite all the efforts made to carefully evaluate the CIA information, for the most part it was almost impossible to determine if the information provided by the CIA was identifiable with the detainee. Even if the name was the same or quite similar, many of the names were common and the lack of

other identifiers beyond names made connecting the information to the detainees nearly impossible.

The SSA explained that the group of agents and intelligence analysts assigned to the project attempted to prioritize its work so that those with final orders of removal or other issues could be dealt with first. Cases were sometimes brought to their attention that were "priority" due to a court date or order of removal.

In late November 2001, INS Chief of Staff Cerda contacted Levey by e-mail to complain again about the timeliness of the CIA checks. He stated that 157 September 11 detainees who otherwise had been cleared by the FBI were "in limbo" while waiting for CIA checks. He asked Levey whether the Department would reconsider its policy to require CIA checks under these circumstances.[48]

By the time Cerda raised this concern, even Fisher, a Criminal Division Deputy Assistant Attorney General and a member of the SIOC Working Group who initially imposed the CIA check requirement, was willing to reconsider the issue. In a November 29, 2001, e-mail to TVCS supervisors, Fisher wrote, "I guess my initial view is that we should triage at this point, rather than scrap the system. Let's hold on people where we have other [negative] information until the CIA checks go through. Let's get a CIA list with priority. And for those who are ready to be deported and we have no other [negative]

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[48] This demonstrates the misperception held by many people, including some at the INS, who incorrectly attributed delays in the clearance process to unresponsiveness by the CIA rather than at FBI Headquarters.

info, let's let them be deported if CIA can't check, as a last resort."

Levey told the OIG that he did not feel comfortable making the decision about Cerda's request to change the CIA check policy without additional input, so he consulted David Laufman, the Deputy Attorney General's Chief of Staff. Levey told the OIG that Laufman advised him to continue to require CIA checks, and Levey said he communicated this decision to Cerda by e-mail. Laufman told the OIG that while he did not recall specifically being asked by Levey about the CIA check policy, he did not dispute Levey's claim that they discussed the matter. Laufman also stated that there could be "catastrophic consequences" if the Department turned one person loose it should not have.

Levey said that even after the decision to keep requiring CIA checks, he continued to try to expedite the CIA check process. Ultimately, however, the decision to require CIA checks and FBI clearance before a September 11 detainee could be removed from the country was changed. On February 6, 2002, based upon the FBI's re-evaluation of the "hold until cleared" policy, Levey changed the Department's policy that up to that point required formal clearance from both the FBI and CIA before removing a detainee. Neither the FBI nor the Criminal Division opposed the change. This reversal is described in detail in Chapter 6 of this report.

### D. Examples of Delays

The following are examples of how delays in conducting clearance investigations affected individual September 11 detainees:

- An alien arrested in early October 2001 in the New York City area had been employed by a Middle Eastern airline, although not as a pilot. The alien, who entered the United States as a crewman, had been ordered removed from the country in 1995. His appeal of that order had been dismissed in 1996. In October 2001, he was arrested based on a lead received by the FBI indicating he was employed in the airline industry. On the Form I-213 completed on the day of his arrest, the INS special agent indicated, "FBI Trenton stated there is no reason to delay with removal of the subject." The alien was nonetheless placed on New York's "special interest" list because he had been arrested on a PENTTBOM lead stemming from his previous employment in the airline industry. In mid-October 2001, FBI agents interviewed the alien, one of his relatives, and his previous employer. On November 21, 2001, the FBI agent assigned to the SIOC Working Group sent an EC to the Special Agent in Charge of the FBI Newark Field Office requesting information about the detainee, stating:

  > [A]ll response ECs should contain a statement from the SAC or his/her designee stating whether the FBI has an investigation [sic] interest in [the] detainee. If a field office does not have an investigative interest in a detainee, the response EC should state this fact and request that Project INS/FBI Detainee conduct appropriate CIA name checks. Once the no interest EC is received from a field office and CIA name checks are completed, a letter will be generated to INSHQ advising of FBI's no interest if the

name checks do not provide information of investigative interest.

The EC contained no specific deadline for a response, although it had a precedence of "Immediate" and requested the information "as soon as possible."[49] We could find no response from the FBI Newark Field Office. In early December 2001, FBI Headquarters requested that the CIA conduct a name check for the detainee. In mid-December 2001, FBI Headquarters sent a follow-up EC to the FBI Newark Field Office, also with a precedence of "Immediate," again requesting the "interest/no interest" assessment. Before it received a response to this second EC, FBI Headquarters received the results of the CIA name check that found "no identifiable information" in connection with the detainee. The CIA response arrived 17 days after the FBI requested the name check. This detainee's name subsequently appeared on a list of detainees held more than 90 days that the INS forwarded to the Office of the Deputy Attorney General during the third week of January 2002. Within a week of the detainee's

[49] FBI ECs have a line marked "precedence" that can be designated "immediate," "priority," or "routine." The FBI Investigative Manual states that the "immediate" designator is to be used when the addressee(s) must take prompt action or have an urgent need for the information. Immediate teletypes require approval by the special agent in charge, division head, or their designated representative (at FBI Headquarters) and must be given preferred handling. The FBI Investigative Manual states that "priority" is used when information is needed within 24 hours, while "routine" is used when information is needed within the normal course of business.

name appearing on this list, the FBI Newark Field Office provided FBI Headquarters with an EC stating it had "no interest" in the detainee and, based on that information, FBI Headquarters produced a clearance letter indicating that the INS could remove the detainee.

Thus, it appears that the FBI completed all field investigative work within three weeks of the detainee's arrest. The CIA check, which was negative, took slightly more than two weeks. Yet the detainee was not cleared for nearly four months. Based on the FBI Newark Field Office's and Headquarters's records in connection with this case, there does not appear to be any justification for the three-and-a-half-month delay in clearing this detainee. Furthermore, the timing of the clearance suggests that the reason the FBI finally cleared him was due to his inclusion on the list forwarded by the INS to the Office of the Deputy Attorney General.

- A Middle Eastern man in his 20s was arrested on August 30, 2001—more than a week prior to the terrorist attacks—for illegally crossing the border from Canada into the United States without inspection. After the September 11 attacks, the alien was placed on the New York "special interest" list even though a document in his file, dated September 26, 2001, stated that FBI New York had "no knowledge" of the basis for his detention. FBI Headquarters did not request a CIA name check on the detainee until November 8, 2001. The name check came back negative 13 days later,

but the clearance letter was not issued until December 7, 2001. The alien was removed in late February 2002.

- A Muslim man in his 40s, who was a citizen of [redacted], was arrested after an acquaintance wrote a letter to law enforcement officers stating that the man had made anti-American statements. The statements, as reported in the letter, were very general and did not involve threats of violence or suggest any direct connection to terrorism. Nonetheless, the lead was assigned to a special agent with the JTTF and resulted in the man's arrest for overstaying his visa. Because he had been arrested on a PENTTBOM lead, he automatically was placed in the FBI New York's "special interest" category.

  Within a week, the New York FBI Field Office conducted a detailed interview of the detainee. By mid-November 2001, the Field Office concluded that the detainee was of no interest. However, FBI Headquarters did not request a CIA name check until December 7, 2001. In addition, FBI Headquarters failed to include the INS Form I-213 with its request to the CIA, even though the FBI Field Office's records reflected that the FBI had a copy of the detainee's Form I-213 in its file. A CIA response to the FBI's request, dated late February 2002, indicated that the detainee's case was one of those "pending 213s from 12/7." The response also indicated that the CIA found "no identifying information" about the detainee in its databases. FBI Headquarters issued the detain-

ee a clearance letter the next day. Thus, it appears that this alien, who was cleared by the New York FBI Field Office by mid-November 2001, was not cleared by FBI Headquarters until late February 2002 due to an administrative oversight.

### E. Knowledge of the Delays in the Clearance Process

At the end of September 2001, an attorney from the Criminal Division's TVCS, who was also a member of the SIOC Working Group, raised concerns to his superiors that the FBI lacked adequate resources to conduct detainee clearances in a timely manner. In response, the Principal Deputy Chief of the TVCS drafted a memorandum in late September or early October 2001 from Assistant Attorney General Chertoff to Dale Watson, then the Assistant Director of the FBI's Counterterrorism Section. The draft memorandum requested that each FBI field office designate at least one agent to promptly interview September 11 detainees held in that district, and urged that these interviews be conducted on a "priority basis." The memorandum also requested that "[s]ufficient resources must be allocated in SIOC to provide notification to field offices of detainees and bond hearings in their districts and to facilitate the exchange of information to the INS attorney who will appear at the bond hearing. Currently, one person is handling this responsibility for all detainees and detention hearings with only intermittent assistance." Finally, the draft memorandum noted that "It is important that these aliens in detention are handled appropriately to make sure that those who are of investigative interest continue to be detained and those who are not of investigative interest are handled by the INS in the manner that similarly situated aliens would be handled."

After reviewing the draft memorandum, the TVCS attorney sent a typed note to the Chief and Deputy Chief of TVCS saying he believed that the FBI Director would "want to know that the field isn't getting the job done." He added, "To be candid, we are all getting screwed because the Bureau's SACs haven't been told explicitly they must clear, or produce evidence to hold, these people and given a deadline to do it." He suggested that the way to resolve the problem was to "get to [FBI Director] Mueller or [Deputy Director] Pickard, and have them direct the SACs to interview, run checks and clear or recommend holding people within 24 hours and direct necessary HQ personnel to clear NLT [no less than] 24 hours after that."[50] He told the OIG the purpose of his typed note was to "urge that the memo to the FBI be more blunt." He said, with respect to this note, that the FBI was not staffing the detainee cases with sufficient resources. According to this attorney, the Criminal Division eventually decided not to send the memorandum to the FBI.

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[50] The attorney also wrote in his note, "We are sending INS into immigration court today to argue, in essence, that he [the alien] be held without bond because of WTC [World Trade Center]." The TVCS attorney told the OIG that after reviewing the files of these detainees it was "obvious" that the "overwhelming majority" were simple immigration violators and had no connection to the terrorism investigation. He said continuing to hold these detainees was a waste of resources and could damage the Government's credibility to oppose bond or release in more meritorious detainee cases. He acknowledged that the only way to know "for sure" if these detainees were linked to terrorism was to conduct clearance investigations, but he argued that the Government must provide the resources for such an effort.

When interviewed by the OIG, Chertoff said that while he was familiar with the contents of the draft memorandum, he did not know whether it was sent (it was not, according to other witnesses). Chertoff recalled orally raising the issue of the pace of clearance investigations with FBI Director Mueller and Assistant Director Watson, but indicated that during the first few months after the attacks he believed these issues related to the impact of the clearance process on bond hearings (as opposed to removal of aliens from the United States). Chertoff told the OIG that he later became aware of a delay in removing detainees when he received questions from Congress about this issue as a follow-up to his November 28, 2001, testimony before the Senate Committee on the Judiciary.[51]

Director Mueller said he did not recall hearing about any problems with the clearance policy until the spring or summer of 2002. He said he did not recall any expectation of how long the process would take, and he did not learn how long the process in fact was taking. At some point, however, he said he learned that it was taking more than a few days. He said he would have expected problems with the clearance process and the time it was taking to be handled at a level lower than him.

INS Commissioner Ziglar told the OIG that he called FBI Director Mueller on October 2, 2001, to discuss the INS's problems in obtaining timely clearances from the FBI. FBI Deputy Director Pickard returned the call. Ziglar said he told Pickard that the FBI was putting the

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[51] Chertoff is apparently referring to this question posed by Senator Leahy: "Is the Department intentionally holding people in American custody even after they have been ordered removed?"

INS in the awkward position of holding aliens in whom the FBI had expressed "interest" but then failing to follow through with a timely investigation. Ziglar said he told Pickard that unless the INS received written releases in a timely manner, the INS would have to start releasing September 11 detainees. Pickard, who retired from the FBI in November 2001, told the OIG that he did not recall this conversation with Ziglar. Further, he said that he had no recollection of any complaints from the INS regarding the pace of the FBI clearance process.

Ziglar also told the OIG that he contacted the Attorney General's Office on November 7, 2001, to discuss concerns about the clearance process, especially the impact of adding the New York cases to the INS Custody List. He initially called David Ayres, the Attorney General's Chief of Staff, but recalls reaching David Israelite, the Deputy Chief of Staff. According to Ziglar, he alerted Israelite to the fact that September 11 detainee cases were not being managed properly and warned of possible problems for the Department. Ziglar told the OIG that he was frustrated at this time and felt powerless to resolve the situation because he had no authority over the FBI, which was responsible for determining which detainees were "of interest," who would be cleared, and when. Israelite told the OIG that he could not recall this particular conversation with Ziglar and did not recall any complaints from the INS during the fall of 2001 regarding the clearance process for September 11 detainees.

Ziglar said that based on these and other contacts with senior Department officials, he believed the Department was fully aware of the INS's concerns about the ramifications caused by the slow pace of the detainee

clearance process. When asked why he did not press the issue with the Attorney General or the Deputy Attorney General, he acknowledged that at some point he should have "gone around the chain of command" directly to the Attorney General or the Deputy Attorney General, but he felt it would have been futile to approach them directly about these issues because he did not think the outcome would have been different.

Deputy Attorney General Thompson told the OIG that he had not been made aware of the slow pace of FBI clearance investigations. He said that had the INS alerted him to the time limits it believed were applicable, he would have contacted the FBI immediately. Thompson said he received regular briefings during this period regarding the INS in which he was assured that the immigration processes for the detainees were being handled "properly."

The Attorney General stated that he had no recollection of being advised that the clearance process was taking months, nor did he recall hearing any complaints about the timeliness of the clearance process or a lack of resources dedicated to the effort to clear detainees.

## VI. FBI WATCH LIST

In contrast to the inefficient way that the clearance process for September 11 detainees on the INS Custody List was handled, the FBI handled clearances from another important list—its watch list—in a more efficient manner.[52] We briefly discuss the FBI's handling of this

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[52] We have not analyzed legal issues that may be presented by the creation of such a list, nor have we determined whether the list itself was effective from an investigatory or public safety perspective.

watch list to illustrate the differences in how the two clearance processes were handled.

The day after the terrorist attacks, the FBI began developing a watch list originally designed to identify potential hijackers who might be planning additional terrorist acts once air travel resumed. The FBI distributed the watch list to airlines, rail stations, and other common carriers to assist in its terrorism investigation.

The FBI developed two versions of the list. One contained a person's name and date of birth only and the other contained additional information. The information on the lists was updated once or twice daily. The FBI provided the name and date of birth list to common carriers such as Amtrak, bus companies, truck rental companies, and the National Business Aviation Association. By September 26, 2001, the list had grown from the initial names to several hundred. As word spread nationwide that such a watch list existed, various agencies requested that names be added to the list.

Kevin Perkins, the Inspection Division Section Chief at FBI Headquarters who coordinated the watch list, told the OIG that he immediately recognized that the existence of the list created risks that innocent persons not connected to terrorists would be unfairly implicated. He said he wanted to create a mechanism for limiting who was placed on the list and for removing people from the list as quickly as possible. Perkins recruited an attorney from the FBI's Office of General Counsel to assist with managing the watch list and asked the attorney to develop parameters for placing names on the list that followed the Attorney General's guidelines for opening a criminal case. The attorney prepared a one-page

document called "Screening Characteristics for Lookout Lists" that set out three categories of persons to be placed on the list.

Perkins said the list eventually grew to as many as 450 people. At one point, Perkins's supervisor said he directed that no one could be added to the list without his authorization. When interviewed by the OIG, Perkins and the attorney assisting him said they became concerned that individuals were being placed on the list who had no connection to terrorists. For example, because the airlines use a "soundex" system to retrieve like-sounding names, this resulted in names ending up on the list as soundex matches to names that were entirely different. Perkins also gave an example where a group of entries on the list all had the same first initial and a common last name, with no additional information.

Perkins told the OIG that he quickly turned his attention from regulating who got on the list to working to get people off the list. He recruited a group of legal instructors stationed at the FBI Academy in Quantico, Virginia, to help manage the process. Perkins said he ensured that all of the names on the list were indexed and he created a file for each. He asked the legal instructors to take each file and review how each person got on the list and what work had been done by FBI field offices to follow up on any initial leads. He told the OIG that he asked the legal instructors to review the sufficiency of the information and to run records checks for each person.

Perkins said that in some instances, removing people from the list was not difficult. For example, a [redacted] FBI field office had provided information

that approximately 20 Arab men attended the same flight schools as the hijackers, so these men were placed on the list. Upon further checking, this information turned out to be inaccurate—the men had attended flight schools, but not the same ones as the hijackers. Consequently, the men's names were taken off the list.

By late October 2001, the FBI alerted its field offices that it had stopped adding names to the watch list. By the end of November 2001, Perkins said the team had reduced the watch list to 20 to 30 names, 19 of which were the names used by the hijackers (the FBI was uncertain whether they had used their real names).

## VII. OIG ANALYSIS

The Department reacted swiftly to the attacks on the World Trade Center and Pentagon by launching a massive investigation in this country and abroad. Within a week of the attacks, the FBI had assigned more than 7,000 employees to the task of tracking down anyone who had aided the terrorists and attempting to prevent additional attacks. In the ensuing weeks, JTTF agents and other law enforcement officers across the country arrested hundreds of illegal aliens they encountered while pursuing PENTTBOM leads, whether or not they were the subjects of the leads. While it is beyond the scope of the OIG's review to assess the appropriateness of these law enforcement actions, we saw some instances of the detention of aliens that appear to be extremely attenuated from the focus of the PENTTBOM investigation.

The Department instituted a policy that all aliens in whom the FBI had interest in connection with the PENTTBOM investigation, no matter how tangential the connection, required clearance by the FBI of any connec-

tion to terrorism before they could be removed or released. Therefore, determining which of these aliens was "of interest" to the FBI's terrorism investigation became the first of a series of critical decision points. We found that often the FBI could not state whether or not it had an interest in a particular alien and therefore, out of an abundance of caution, the FBI labeled the alien of interest or of unknown interest, and consequently the INS treated the alien as a September 11 detainee who required clearance from the FBI before he could be released.

In fact, in New York City we found that the FBI and the INS made little attempt to distinguish between aliens arrested as subjects of a PENTTBOM lead and those encountered coincidentally. This lack of precision had important ramifications for many aliens in the time they spent confined and the conditions of that confinement, as we discuss in subsequent chapters of this report.

We do not criticize the decision to require FBI clearance of aliens to ensure they had no connection to the September 11 attacks or terrorism in general. However, we criticize the indiscriminate and haphazard manner in which the labels of "high interest," "of interest," or "of undetermined interest" were applied to many aliens who had no connection to terrorism. Even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. Alternatively, by early November 2001, when it was clear that the clearances could

not be accomplished in a matter of days (or even weeks), the Department should have permitted the FBI and INS to review the cases and keep on the list only those detainees for whom there was some factual basis to suspect a connection to terrorism or to the PENTTBOM investigation.

We found that the information provided to high-level Department officials suggested that this "hold until cleared" policy was being applied to persons "suspected of being involved in the September 11 attacks." In practice, the policy applied much more broadly to many detainees for whom there was no affirmative evidence of a connection to terrorism. This disconnect should have been discovered earlier and should have caused a review of the manner in which detainees were being categorized.

We appreciate the difficulty of making a definitive and expeditious determination in many cases, and realize that in the weeks and months after September 11 law enforcement decided to err on the side of caution. However, the manner that these designations were applied to arrested aliens was in many cases weak. Moreover, the FBI failed to provide adequate field office staff to quickly conduct the detainee clearance investigations and failed to provide adequate FBI Headquarters staff to effectively coordinate and monitor the detainee clearance process. This contributed to the slow pace of the FBI's clearance process, which meant the FBI's initial determination of its "interest" had enormous consequences for the detained aliens.

We also found that the FBI's clearance process was understaffed and not accorded sufficient priority. Moreover, despite the belief at high levels of the De-

partment that the clearance investigations underlying the "hold until cleared" policy could be and were being done quickly, we found that they were not. The average time from arrest to clearance was 80 days and less than 3 percent of the detainees were cleared within 3 weeks of their arrest.

We found several reasons for this substantial delay. Although initially the clearance process was handled exclusively at local FBI offices, the clearance decision was soon centralized at FBI Headquarters. While the desire to centralize these decisions was supportable, given the need for a consistent process overseen on a national basis, centralization delayed the clearance process.

Moreover, the FBI failed to devote adequate resources to the task. Agents responsible for clearance investigations were often assigned other duties and were not able to focus on clearance investigations. The result was that detainees languished on the list for weeks and months, with no investigations being conducted.

Another reason for the delay was the inclusion of all New York City detainees arrested in connection with PENTTBOM leads being placed on the INS Custody List and therefore requiring FBI clearance. While this decision also was supportable, given the desire not to release any alien who might be connected to the attacks or terrorism, the inclusion of so many detainees in the clearance process required the FBI to devote additional resources to the clearance task. This did not happen, and the inclusion of 300 new names on the list overwhelmed the resources of the FBI in conducting clearance investigations.

As part of the clearance investigation, the Department required CIA name checks for all September 11 detainees. While we were told that the CIA delayed conducting the checks, we did not find this to be true. We found that the CIA conducted the checks in a timely fashion and that the delays relating to CIA name checks resulted from inaction by the FBI in reviewing the checks, not delays by the CIA in conducting them.

In contrast to the untimely manner in which the FBI handled the clearance process for September 11 detainees, the FBI handled adding and removing names to its watch list in a much more timely manner. Although we did not conduct an in-depth analysis of the watch list, it is clear from our limited review that the FBI was cognizant of the need to expeditiously remove people from that list who should not be on it. By contrast, the FBI did not devote similar attention to clearing September 11 detainees who had no connection to terrorism. The handling of the watch list also demonstrates the benefits of placing an individual with operational authority and access to substantial resources in charge of a project of this nature.

The untimely clearance process had enormous ramifications for September 11 detainees, who were denied bond and also were denied the opportunity to leave the country until the FBI completed its clearance investigation. For many detainees, this resulted in their continued detention in harsh conditions of confinement, which we describe in the chapters that follow.

# CHAPTER FIVE

# THE DEPARTMENT'S "NO BOND" POLICY FOR SEPTEMBER 11 DETAINEES

This chapter examines the Department's "no bond" policy for September 11 detainees. We first provide background on relevant immigration law, including an overview of the charging, bond, and removal processes for aliens arrested for immigration violations. Next, we describe the Department's efforts to oppose bond for all September 11 detainees while the FBI conducted its clearance investigations. We also address the INS's efforts to comply with the policy, despite its concerns about the legal dilemma created by the lack of information for bond hearings.

## I. BACKGROUND ON IMMIGRATION LAW

The INS has authority to arrest aliens if they are present in the United States in violation of immigration law. Aliens who were never lawfully admitted into the United States are labeled "inadmissible." Aliens who were lawfully admitted into the United States but failed to maintain their immigration status, overstayed their visa, or engaged in unlawful conduct are "removable" or "deportable." In either case, the proceeding that ensues is currently referred to as a "removal" proceeding. It takes place in the Immigration Court, a trial-level tribunal that determines whether an alien is in the United States in violation of law, and, if so, whether any waiver or benefit is available that would allow the alien to remain

in the United States lawfully.[53] The Office of the Chief Immigration Judge coordinates the activities of the more than 220 Immigration Judges located in 51 Immigration Courts throughout the country. Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals (BIA). Both the trial and appellate-level courts are components of the Department of Justice, under the authority of the Attorney General. In certain instances, aliens may appeal the decisions of the BIA to federal court.

Removal proceedings begin when the INS issues a "Notice to Appear" (an "NTA") to an alien detained on federal immigration charges. As we described in Chapter 3, the NTA, issued by an INS District Director, is the charging document in a civil immigration case. The INS serves the NTA on both the alien and the local Immigration Court.

The INS District Director is responsible for setting the initial bond for an alien. The alien can request a bond re-determination hearing before an Immigration Judge by marking a box on the INS Form I-286 "Notice of Custody Determination," which is served on the alien at the same time as the NTA.[54] In certain cases, aliens are not eligible for bond, but in most cases, according to the INS General Counsel, the INS must provide justification to support its position to hold aliens without bond.

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[53] Removal proceedings are generally referred to as "section 240 proceedings" because they are governed by section 240 of the Immigration and Nationality Act, codified at 8 U.S.C. §§ 1101-1537.

[54] See copy of Form I-286 at Appendix G.

Separate from the bond hearing, the alien is entitled to a merits hearing.[55] If the Immigration Judge orders removal and the alien does not appeal, the "order of removal" becomes final and the "removal period" begins. This removal period is the phase during which the INS arranges for the alien to be returned to the alien's country of citizenship. Under federal immigration statutes, the INS "shall remove the alien within a period of 90 days" from the date the order becomes final.[56] There are a number of reasons why removal may not be accomplished within that time frame, which the statute takes into account, such as aliens obstructing their return or a failure of the alien's home country to accept the alien's return. The removal period generally begins on the date the removal order becomes administratively final. Where an alien is being held for non-immigration reasons (such as when an alien is serving a criminal sentence), the removal period begins on the date the alien has finished his criminal sentence. The removal period can be extended if the alien fails to apply in good faith for travel or other documents necessary for his or her departure or takes other actions to prevent his or her removal.

According to the Immigration and Nationality Act, aliens who receive final orders of removal while being detained by the INS must continue to be detained during the 90-day "removal period."[57] Once the initial 90-day

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[55] The merits hearing is held to determine whether the alien is removable, or whether the alien is entitled to relief that would permit the alien to stay in the United States despite the fact that the alien is technically removable, such as if the alien is eligible for asylum.

[56] 8 U.S.C. § 1231.

[57] "[D]uring the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 241(a)(2) (emphasis added).

removal period is over, if the alien has not departed the country the alien "shall be subject to supervision under regulations prescribed by the Attorney General." The statute permits certain aliens to be detained beyond the 90-day removal period, including those whom the INS —through a delegation of authority from the Attorney General—identifies as risks to the community or whom are unlikely to comply with the removal order.[58]

In the alternative, an alien can avoid an order of removal (and the negative consequences of such an order, including its 10-year ban on returning to the United States) by agreeing to voluntarily depart the United States. Aliens who accept "voluntary departure" may remain in custody pending departure or may be released.[59]

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[58] According to INS data, 48 of the 762 (6 percent) September 11 detainees had received a final removal order prior to their arrest as part of the PENTTBOM investigation. Some of these detainees had been released from INS custody and ordered to appear on a certain date to be removed, but had failed to do so. Consequently, a final order of removal already was in existence for them when they were arrested after September 11 in connection with the terrorism investigation.

[59] Certain aliens are not entitled to removal proceedings because they waived rights in advance of their arrival in the United States under the auspices of special programs, such as the Visa Waiver Program. Under the Visa Waiver Program, aliens from 28 specified countries may visit the United States for up to 90 days without first obtaining a visa. These aliens can be summarily returned to their countries if they are found to have violated the terms of the Visa Waiver Program.

## II. DEPARTMENT'S STRATEGY FOR MAINTAINING DETAINEES IN CUSTODY

As discussed in Chapter 2, after September 11 the Department was concerned about the possibility of additional terrorist attacks and the FBI immediately sought to shut down any "sleeper" cells of terrorists who might be preparing another wave of violence. The Department also wanted to ensure that the individuals it arrested as part of the PENTTBOM investigation would not be released to potentially cause additional harm, which led to the "hold until cleared" policy discussed previously. As Deputy Attorney General Thompson explained to the OIG, an individual arrested and detained posed no ongoing threat to the United States, and therefore law enforcement officials could focus on arresting others still at large who did pose a potential threat. Assistant Attorney General Chertoff told the OIG that, after the attacks, the Department almost immediately turned its attention to prevention, and that he and other top-level officials discussed using all legally available means to ensure that those who posed a danger would not be able to carry out further attacks.

The Attorney General told the OIG that, even though some detainees may have wanted to be released or may have been willing to leave the country, it was in the national interest to find out more about them before permitting them to leave. In addition, he said that the United States might want to share the information with the country to which the alien would be removed. He also noted that in the past the Department had problems with persons who were released pending appeal of their removal orders, because a very high percentage of them

became "absconders" who later could not be located to be removed.

Within the Office of the Deputy Attorney General, the official primarily responsible for oversight of immigration issues was Associate Deputy Attorney General Stuart Levey. He and two attorneys (one a Senior Counsel) who reported to him coordinated the Department's strategy to maintain control of the September 11 detainees until they were cleared by the FBI.

On September 27, 2001, the Senior Counsel in the Deputy Attorney General's office sent an e-mail to David Ayers, Chief of Staff to the Attorney General, that included a "strategy for maintaining individuals in custody." The first section of the document attached to the e-mail, "Potential AG Explanation," explained that the Department was using several tools to maintain custody of all individuals suspected of being involved in the September 11 attacks, which involved criminal charges and material witness warrants for those in the country legally and immigration charges for those in the country illegally. The document noted that the INS already had 125 persons "related to this investigation" in custody, and that these detainees were requesting bond hearings. It stated:

> In preparation for bond hearings for these individuals, the FBI and INS are diligently working to provide the INS attorneys in locations where these aliens are detained with all available information relating to the individual's risk of flight and dangerousness. Attorneys from the Criminal and Civil Divisions are participating in this process to coordinate the immigration proceeding with the criminal investigation and to

prepare to defend against petitions for writs of *habeas corpus* that these aliens will almost certainly file. In addition, the Criminal Division is examining each of the cases to determine whether the person can be detained on criminal charges or on a material witness warrant if the person is ordered released from INS custody.

The second section of the document explained that detained aliens who were not satisfied with their initial bond or no-bond determination could request bond redetermination hearings. The document then described efforts the FBI and INS would make to ensure that the aliens in question would not be released on bond.

According to the document, the INS would be obtaining information relevant to the alien's risk of flight and dangerousness and would present that information to the Immigration Judge at the alien's bond hearing through proffers, documents, or witnesses. If only classified information was available to establish the alien's dangerousness or risk of flight, the information would be used only as a last resort after high-level review of the case. If the Immigration Judge ordered the alien's release, the INS would "immediately" file a motion to stay that decision and would appeal the decision to the BIA. If the BIA ordered the alien released, the INS would refer the case to the Attorney General. According to the document, the Civil Division was preparing briefs in anticipation of having to oppose petitions that might be filed by aliens seeking release in federal court. The Department planned to argue that any such petitions filed before resolution of the aliens' bond hearings were premature, and it planned to appeal any adverse decision from a federal district court granting release to these

aliens. The strategy noted that if any alien "believed to be involved in the September 11 attacks" was ordered released, the Criminal Division might still be able to obtain a material witness warrant.

Implementation of this strategy, as discussed in the following sections of this chapter, determined whether a September 11 detainee would be released on bond pending a hearing on his immigration charges.

## III. INS EFFORTS TO MAINTAIN DETAINEES IN CUSTODY

The INS took a variety of steps to ensure that aliens arrested in connection with the PENTTBOM investigation would not be released until the FBI had determined that they posed no danger to the United States. INS District Directors made an initial custody determination of "no bond" for all September 11 detainees (since granting bond could have resulted in the release of aliens not yet cleared by the FBI). Second, INS Executive Associate Commissioner for Field Operations Michael Pearson issued a directive two days after the terrorist attacks instructing INS field offices that no September 11 detainee could be released without Pearson's written authorization. Third, officials at INS Headquarters created a bond unit to handle the September 11 detainees' cases. Fourth, INS attorneys requested multiple continuances in bond hearings for September 11 detainees in an effort to keep the detainees in custody as long as possible. We describe these actions in turn.

### A. Initial "No Bond" Determination

One of the initial steps taken by the INS to ensure that the September 11 detainees would not be released

was the requirement that District Directors across the country who made the initial bond determination for aliens charged under federal immigration law make custody determinations of "no bond" for all September 11 detainees. As explained above, an alien initially denied bond by a District Director has the right to request a bond re-determination hearing before an Immigration Judge. In response to the blanket "no bond" policy, many September 11 detainees requested bond re-determination hearings. Consequently, the INS had to defend the "no bond" determination at hearings soon after the terrorist attacks. For example, 40 September 11 detainees had bond hearings scheduled during the week of September 24, 2001.

**B. Pearson Order**

Another aspect of the INS's efforts to maintain control of aliens arrested as part of the PENTTBOM probe immediately after the terrorist attacks was a directive issued by Pearson to ensure that no September 11 detainee would be released by the INS until "cleared" by the FBI of any connection to terrorism. By September 13, 2001, Pearson issued an order to all INS field offices—at INS Commissioner James Ziglar's request—directing that "Effective immediately, all persons arrested by the FBI, and turned over to the INS will not be released without written permission" from Pearson. In the initial period after the September 11 attacks, Pearson would not draft such a memorandum until he received a clearance letter from the FBI.[60]

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[60] A sample of a "Pearson" memorandum is attached as Appendix H.

### C. Creation of a Bond Unit at INS Headquarters

To help INS field offices obtain evidence for the many bond hearings involving September 11 detainees, the INS established a Bond Unit at INS Headquarters in late September 2001. The unit, located at the FBI SIOC, consisted of six INS attorneys.

An e-mail sent by an INS National Security Law Division (NSLD) attorney to INS district offices on October 1, 2001, instructed all INS District Counsels to keep the Bond Unit informed of all bond hearings for aliens on the INS Custody List.[61] This e-mail explained that Bond Unit attorneys would be working with the FBI and Department attorneys to review FBI Headquarters's files for information that could be helpful at bond hearings for September 11 detainees. At the same time, the e-mail encouraged INS District Counsels to contact local FBI field offices to "ascertain if there is any information in the FBI file which could help INS maintain a successful 'no bond' position in litigation." The e-mail indicated that the FBI had agreed to work cooperatively with local INS District Counsels to provide "as much information as possible without compromising the WTC/Pentagon investigations." The e-mail also instructed the District Counsels to inform the Bond Unit of any information they obtained from FBI field office files so that the Bond Unit could review the information and "clear" it for use in a detainee's bond hearing. This was designed to ensure

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[61] INS districts employ District Counsels who have staff attorneys who represent the INS in immigration proceedings, including bond hearings.

that information used at such hearings would not compromise the ongoing September 11 investigation.[62]

### D. Opposing Release at Bond Hearings

#### 1. Concerns About Lack of Evidence for Bond Hearings and Impact of Delays in the Clearance Process

According to many INS officials we interviewed, implementing the Department's "no bond" position for every September 11 detainee quickly became very difficult. Owen ("Bo") Cooper, the INS General Counsel, said he was concerned whether INS attorneys facing bond hearings would have the evidence needed to support their effort to keep the detainees in custody. Several INS officials told the OIG that, at least initially, they expected the FBI to provide them with additional information to present at detainee bond re-determination hearings to support the "no bond" position. Instead, INS officials told the OIG they often received no information from the FBI about September 11 detainees and, consequently, had to request multiple continuances in their bond hearings.

On September 19, 2001, Cooper sent an e-mail to an INS Regional Counsel describing the problem and discussing his efforts to obtain more information from the FBI about September 11 detainees: "As for the infor-

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[62] At the time, while the Department could close immigration hearings, thereby protecting the information discussed at those hearings, it did not have the ability to request a "protective order." On May 28, 2002, the Department published new regulations that allowed for "protective orders" for certain information disclosed during immigration proceedings, similar to the process used in criminal proceedings in which a pleading may be filed under seal. 8 C.F.R. § 3.46.

mation to support a no-bond determination, we are trying today to break through what has been an absence of information from the investigation to use in the immigration process." Other INS officials expressed similar concerns, even as late as the summer of 2002. In a June 27, 2002, memorandum, INS Deputy General Counsel Dea Carpenter stated, "It was and continues to be a rare occasion when there is any evidence available for use in the immigration court to sustain a 'no bond' determination." An INS District Director brought to INS Headquarters to assist with the detainee cases told the OIG that in many instances the FBI would base its interest in a detainee on the sole fact that the alien was arrested in connection with a PENTTBOM lead. Thus, even though from the INS's perspective it had no evidence to support a "no bond" position, INS attorneys were required to argue that position in court.

The SIOC Working Group helped draft what they referred to as "boilerplate" documents that INS Counsel could use to oppose bond for September 11 detainees. These boilerplate memoranda, which became known as "declarations," took the form of affidavits signed by FBI agents that described the PENTTBOM investigation and the general national security concerns related to individuals arrested in connection with the investigation. While some declarations had space for the document to be customized by inserting details related to the particular detainee in question, others did not. Beginning October 4, 2001, and continuing over the next two months, INS attorneys filed 89 declarations and similar "letterhead memoranda" opposing bond for September 11 detainees.

The INS's Bond Unit provided the OIG with examples of the problems caused by the lack of FBI information for detainee bond hearings. In one case, an INS attorney in the INS New Orleans District complained in an October 4, 2001, e-mail that the A-File of a detained Israeli citizen contained no basis for detention. Further, the attorney said that the FBI had, up to that point, failed to provide him any information about the detainee. The attorney requested assistance from INS Headquarters and raised the specter of "ethical and professional considerations" connected with arguing "no bond" under these circumstances.

In another example, Cooper noted on an October 1, 2001, printout of the INS Custody List that there had been "no single expression of interest" by the FBI for at least 12 of the detainees, 5 of whom were poised for a second bond re-determination hearing because the Immigration Court previously had granted a continuance. Cooper told the OIG that while these cases involved detainees who had been arrested on PENTTBOM leads, the FBI never affirmatively expressed an interest in them.

In another case, officials in the INS Miami District sent an e-mail to INS Headquarters on October 9, 2001, reporting that two detainees were scheduled for bond hearings the next day and "information has been received from local FBI liaison that the FBI may no longer be interested in these aliens." However, the head of the INS's NSLD responded to the Miami District officials that they should continue to oppose bond for the detainees because officials at FBI Headquarters indicated these two detainees had not yet been cleared.

Several witnesses told the OIG that the FBI also failed to provide the resources needed to efficiently manage the complicated and cumbersome process developed to obtain information relevant to bond re-determination hearings, get that information through the review process, and provide it in a format approved for use by INS attorneys at bond re-determination hearings. For example, a supervisor in the Department's Terrorism and Violent Crime Section wrote in an October 5, 2001, e-mail to Levey and others that she had been told that the FBI agent in the SIOC who coordinated the flow of information about detainees from FBI field offices to the INS would be assigned two additional staff members, but the agent had received only intermittent assistance. Other witnesses also told the OIG that they raised concerns about the lack of FBI resources assigned to obtaining information for INS attorneys to use at detainee bond hearings.

In a "normal" immigration case (i.e., not involving a September 11 detainee), FBI field offices generally communicated directly with individual INS district offices to provide information. In these routine cases, INS attorneys would simply call FBI agents to testify at bond hearings to state why the alien should not be released. However, due to the sensitivity of the PENTTBOM investigation, the Department wanted to ensure that no evidence would be used in court unless it was approved at FBI Headquarters. In addition, FBI officials wanted the INS to avoid calling FBI agents to testify at detainee bond hearings, because they did not want aliens' attorneys to be able to inquire into other aspects of the Government's terrorism investigation. Consequently, officials developed a "vetting" process before any evidence

could be used in a detainee's case: information was passed from FBI field offices to the SIOC Working Group to the INS Bond Unit to INS attorneys preparing for court hearings. We found that this process made it much more difficult and time consuming than normal for the INS to obtain evidence for detainee bond hearings.

### 2. Difficulties Presented by New York Cases Added to INS Special Interest List

The fact that hundreds of detainees "of interest" to the FBI had been arrested in the New York area but not initially reported to INS Headquarters (see Chapter 4, Section V(A)) created additional problems for the INS related to bond hearings. In dozens of these cases, INS attorneys initially had not opposed bond for the detainees and treated them as they would aliens arrested for immigration violations in "normal" cases unrelated to PENTTBOM. When these detainees were added to the INS Custody List, the INS was instructed to oppose bond for these detainees. In a November 7, 2001, e-mail to Pearson, INS General Counsel Cooper wrote:

> These are cases that had final unappealed bond orders from judges before they were added to the list (and therefore before there would have been any question of defending "no bond" determinations, appealing negative [Immigration Judge] decision, etc.). In these cases, there is no legal basis not to accept bond, and those aliens who offer to post bond should have that offer accepted and should be released. I have let [the Senior Counsel to the DAG] know that this is the case. (She agreed, by the way.) There are about 25 as of now.

In one case, an INS Regional Counsel advised an INS attorney facing an upcoming bond hearing that, "An alien's addition to the Custody List is not sufficient new evidence that would justify the District Director re-determining bond. General Counsel concurs in this view. Therefore, we are legally obligated to abide by the [Immigration Judge] bond decision and must allow him to post and be released." This alien was released on bond two weeks later.

### 3. INS Attempts to Revise Bond Policy

Given the lack of information about detainees forthcoming from the FBI, the INS developed a process of automatically seeking continuances in bond hearings to give the FBI more time to investigate the detainees. According to Cooper, the INS understood that the FBI needed some time to conduct these clearance investigations. He also said he understood that the FBI considered maintaining custody of the detainees "necessary to its efforts."

However, by early October 2001, Deputy General Counsel Carpenter and others in the INS Office of General Counsel became concerned that their duty of candor to the Court created an ethical dilemma when INS attorneys argued that aliens be detained without bond and there was no evidence to sustain such positions. Consequently, as described below, the INS sought to modify the "no bond" policy to accommodate the Department's desire to hold detainees in custody for as long as possible without crossing the line into legally unsupportable territory.

### a. Proposal to Revise Bond Policy

Cooper said he approached Levey the first week in October 2001 for approval to change the Department's "no bond" policy to avoid many of the problems INS attorneys were facing at detainee bond hearings due to lack of information from the FBI. Cooper proposed that INS attorneys would request a continuance at a September 11 detainee's first bond hearing. If at the time of the second bond hearing the INS still had not received any evidence from the FBI that could be used to argue against bond, the INS would not treat the detainee as if the alien were a "special interest" case and would only argue against bond if it believed the alien presented a flight risk, danger to the community, or any other characteristic commonly argued in "normal" bond hearings. According to Cooper's plan, in such a case the INS also would not attempt to intervene if the alien subsequently posted bond and was ordered released. The FBI opposed Cooper's proposal and any revisions to the "hold until cleared" policy.

Levey agreed to modify the "hold until cleared" policy, but apparently not to the extent the INS requested. Levey told the OIG that he believed the revised policy, described in the next section, adequately addressed the INS's concerns by permitting a detainee to be released on bond if the INS received no information from the FBI about the detainee after the second continuance. However, Cooper told the OIG that the revisions approved by Levey to the Department's "hold until cleared" policy did not include all of the changes he originally requested. Specifically, the revised policy did not allow the INS to treat a September 11 detainee as a "normal" detainee if the FBI failed to provide information to support the "no

bond" position. Instead, the INS still had to continue to oppose bond for all September 11 detainees unless the FBI specifically expressed "no interest."

**b. Revised Bond Hearing Policies**

On October 3, 2001, as a result of the discussions between Levey and Cooper, the INS's Office of General Counsel distributed an e-mail within the INS that described a "revised" policy for bond cases:

> The policy regarding bond conditions for aliens who are detained by the INS and who appear on the "INS Custody List" has been modified. The new policy is outlined below.
>
> New Position on List Cases:
>
> 1) If the alien is appearing for his/her first hearing and the alien is on the "INS Custody List" the [INS] should seek a continuance so that the Service can coordinate with the FBI to obtain evidence relating to the alien's no bond status. If the [Immigration Judge] denies the motion to continue and issues a bond, an emergency appeal/stay must be filed under the previously delineated policy.
>
> 2) If the Service has received a prior continuance in the case and the alien is still on the "INS Custody List" and subsequent to the alien's arrest the FBI has expressed no interest in the alien, the Service should proceed as with any other case by presenting the available evidence.
>
> 3) If the Service has received a prior continuance in the case and the alien is still on the "INS Custody List" and the FBI has expressed an interest in the alien beyond the initial arrest, the Service should seek

> an additional continuance so that it can continue to coordinate with the FBI to obtain any evidence relating to the alien in question. If the [Immigration Judge] denies the motion to continue and issues a bond, an emergency appeal/stay must be filed under the previously delineated policy. The Appellate Counsel's Office will assist with such filings and should be contacted as soon as possible to expedite this process.

Thus, under the revised policy, it appeared that the only cases in which the INS was not required to oppose bond were cases in which the FBI expressed "no interest" in aliens in connection with the PENTTBOM investigation. This expression of "no interest" still had to come from FBI Headquarters—expressions of "no interest" from FBI field offices continued to be insufficient.

However, officials in the INS General Counsel's Office told the OIG that either when the October 3 policy was disseminated or shortly thereafter they began to receive verbal "no interest" statements on particular detainees from FBI SIOC representatives, and they treated these verbal statements as expressions of "no interest" for purposes of the bond policy described above. Thus, between October 2001 and January 2002, a person with a "verbal no interest" statement from the FBI representative to the SIOC could be released on bond.[63] Nonetheless, these verbal "no interests" were not formal FBI clearances and were not sufficient to permit the INS to remove the detainees from the United States.

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[63] The FBI OGC attorney assigned to the SIOC Working Group told the OIG that in January 2002 she stopped issuing verbal "no interest" statements. Instead, she referred to all detainee cases as "pending" until FBI Headquarters issued a written clearance letter.

It later became apparent that the October 3 "revised" policy quoted above was silent as to detainees in whom the FBI had not expressed an interest "beyond the initial arrest" and who were appearing for their second bond hearing. In explaining how to handle these cases not addressed by the "revised" policy, Carpenter told an INS attorney handling a detainee bond hearing: "By the second bond hearing, if no evidence that the person poses a threat to national security exists and [FBI Headquarters] has not affirmatively indicated an interest in the person—our attorneys should treat this case no differently than any other case that is not linked to the events of September 11." This e-mail, sent on October 11, 2001, illustrated the conflict between enforcing the Department's "no bond" policy until the FBI cleared the detainee, and INS attorneys' advice not to oppose bond if the FBI did not express an affirmative interest. It also illustrated the mixed messages INS Headquarters was sending to its employees about detainee bond issues, ranging from Pearson's September 13, 2001, order not to release any detainees without his express authorization to advice from INS's Office of General Counsel not to oppose bond at a detainee's second hearing if no information was forthcoming from the FBI.

In the end, INS officials told the OIG that the October 3 policy changes offered little assistance because the INS continued to run into difficulty obtaining timely expressions of "no interest" from the FBI about individual detainees.[64]

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[64] Levey said he was not provided with a written copy of the "revised" bond policy prior to its issuance. He also expressed frustration that INS officials had not raised the matter with him again when

### E. Proposed Inter-Agency Memoranda

At the same time it was attempting to revise the Department's "no bond" policy, INS officials drafted four form memoranda it wanted to send to the FBI in an attempt to memorialize and expedite the clearance process for September 11 detainees. The first draft memorandum advised the FBI that a detainee who was held without bond had been placed in removal proceedings and noted that the detainee "may be of interest to the FBI" relative to its terrorism investigation. The memorandum had a space for listing the bond hearing date and requested "information necessary for the INS to determine whether it continues to be appropriate to argue before the Immigration Court that the alien should remain in custody without bond." If no such supporting evidence or testimony was provided, the memorandum said the INS would produce whatever information it had in its records for the Immigration Judge to make an appropriate custody determination.

The second draft memorandum requested an immediate update from the FBI on its interest in a specific September 11 detainee. It stated, "Absent any response within 24 hours of this notice, the INS will remove the alien's name from our Custody List and will process the alien according to normal procedures."

The third draft memorandum advised the FBI that the Immigration Court had set bond for a detainee and that, if the detainee posted the bond, the INS would be

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the revised policy, as written, failed to address their concerns. However, INS officials told the OIG they believed the decision had been made, and the attorneys worked within the confines of the policy that they understood Levey approved.

required to release him immediately. It noted that the detainee "may be of interest" to the FBI, but that the extent of the FBI's interest was unknown. The memorandum requested information from the FBI to support an attempt to reopen the bond proceeding.

The fourth draft memorandum advised the FBI that a particular detainee had received a final order of removal. Again, it noted that the detainee "may be of interest" to the FBI but that the extent of the FBI's interest was unknown. The memorandum concluded: "Absent further action on your part, we intend to remove the alien from the United States pursuant to the Order on (date)."

Victor Cerda, the INS Chief of Staff, faxed these draft memoranda to Levey on October 9, 2001, and requested approval to begin sending them to the FBI. Cerda told the OIG that he believed he needed to seek Levey's approval because the memoranda would have altered the Department's directive that no September 11 detainee could be released without first obtaining FBI clearance. While the first and third memoranda relating to the "request for information" and "order setting bond" did not substantially change the policy, the second and fourth memoranda would have altered significantly the existing process by permitting the INS to remove aliens who had final orders of removal without FBI clearance.

According to Cerda, Levey refused to allow the INS to use any of the memoranda and said there was no need to document the clearance process in this written fashion. Commissioner Ziglar told the OIG that he had a "clear recollection" of Cerda informing him about this telephone call with Levey and about Levey's statements regarding the memoranda. Levey told the OIG that he does not

recall making the comment about not wanting the process to be documented. He acknowledged that the INS had been instructed to hold detainees until they were cleared by the FBI, a policy that would have been substantially altered if the INS memoranda were used. Levey said he opposed using the memoranda because he wanted to create a process by which the FBI and the INS worked together cooperatively. He said the documents created an "opposing counsel" type of relationship between two Justice Department agencies. Levey also told the OIG that during this period he understood the Department's position was that the INS's interests were "subservient" to the FBI's investigation, and that it was important to continue holding the detainees while the FBI investigated any possible connections to terrorism. However, Levey also stated that if INS officials believed the memoranda were essential, they should have approached him again to re-argue their position.

Levey told the OIG that he recognized that the process could not work well if the FBI failed to provide sufficient and timely information to INS attorneys to use at detainee bond hearings. He said he raised this issue with other Department officials, including Dan Levin, Counsel to the Attorney General. Levin told the OIG that he did not recall this discussion.

### F. Impact of Pearson Order

Several witnesses told the OIG that Pearson's order directing that no September 11 detainee could be released without his written authorization created tremendous pressure on Pearson to make timely detainee release decisions. Some witnesses said it was difficult to

contact Pearson to obtain timely decisions in detainee cases.

In order to address some of these problems, Pearson eventually orally authorized release of some detainees followed by a written letter. In addition, occasionally Pearson permitted his deputy to sign letters authorizing a detainee's release in his absence. However, these accommodations did not address the dilemma faced by INS field offices that aliens ordered released on bond by an Immigration Judge could not be released without violating Pearson's order. One e-mail from a senior INS official stated, "[I]f bond is set as a condition of custody by the [Immigration Judge] in the hearing, it puts the district director and the [Office of Detention and Removal] staff in the position of either ignoring their orders from Pearson or taking sole responsibility for the continued detention of the alien in opposition to the [Immigration Judge]'s determination."

INS General Counsel Cooper told the OIG that he met with Pearson in October 2001 to argue that his order was creating potential legal liability for the INS, but the order remained in place. Cooper said he advised Pearson and other INS officials that refusal to accept bond on an unappealed bond order, if based solely on the need for a "Pearson" letter, was not legally defensible. Cooper said he also advised Pearson that he was instructing INS field offices not to continue holding aliens who attempted to post bond unless the INS had appealed the Immigration Judge's bond order. Pearson told the OIG that he attempted to address Cooper's concern by issuing release authorization memoranda in advance of detainee bond hearings. The advance release memorandum stated that in the event the Immigration Judge ordered the detainee

released on bond, the INS District Office was authorized to release the detainee.[65] By receiving these letters in advance, the District Office would not have to seek out Pearson in order to obtain his approval to comply with the Judge's order.

The problem continued to arise, however, due to the difficulties in communication between INS field offices, INS Headquarters, and the SIOC. When Pearson continued to insist on the letters despite the continuing problems, Cooper went to Cerda, the INS Chief of Staff. Cerda told the OIG that he encouraged Pearson to ensure that the letters would be issued in a timely manner. But Cerda said he did not favor eliminating the requirement of a letter because the purpose of the letter was to ensure that a terrorist did not get released, and the letter served as a "check" to ensure that all the coordination with the FBI and the Department had occurred.

As a result, INS employees routinely faced the dilemma of choosing between following Pearson's directive or the INS General Counsel's advice. For example, an October 12, 2001, e-mail to Pearson from an attorney working on detainee cases for the INS's NSLD stated that INS Acting Deputy Commissioner Michael Becraft asked her to contact the SIOC to determine if the FBI had any interest in a particular detainee who had been ordered released on bond by an Immigration Judge. The attorney said she told Becraft that if the alien was not released by the INS, "the individual making that decision could be held liable under a Bivens action." She said Becraft instructed her that, "If the FBI did not

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[65] A sample of a Pearson "advance" release memorandum is attached as Appendix I.

provide us with a 'no release' recommendation within 20 minutes of his call, the alien would be released." The attorney contacted the INS NSU's agent on duty, who called the SIOC. The NSU agent reported back to the INS attorney shortly thereafter that the alien was of no interest to the FBI, and the alien was released.

Cooper and Carpenter told the OIG that whenever they confronted a conflict between a detainee's unappealed final bond order and Pearson's directive, their advice was that INS was obligated to release the detainee, regardless of whether the FBI had completed its clearance review.[66] Carpenter noted that she provided this advice with reluctance, given that it was in conflict with the Department's "hold until cleared" policy. For example, an INS Newark District official sent an e-mail to an INS Regional Counsel on November 8, 2001, that he had just learned of a case in which the INS refused to release a detainee when his attorney attempted to post bond even though the Government did not appeal the bond order. The official wrote, "Frankly, I do not know what to tell him because I cannot bring myself to say that the INS no longer feels compelled to obey the law." The Regional Counsel forwarded the message to Cooper,

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[66] Cooper told the OIG that beyond offering advice to INS attorneys handling these cases that it was unlawful for the INS to continue holding aliens who posted bond when the INS had not appealed, he reached out to the Executive Director of the American Immigration Lawyers Association (AILA) and asked her to contact him if she became aware of any aliens caught up in this dilemma. In a number of instances, lawyers for September 11 detainees notified the AILA about their clients' bond problems, the AILA Executive Director notified Cooper, and Cooper worked through internal INS channels to obtain a letter from Pearson so that the aliens' bond could be accepted.

noting that the District official clearly believed that he needed a letter from Pearson in order to release the detainee, even though the Regional Counsel had advised him to the contrary.

This dilemma continued to play itself out again and again as Immigration Judges granted bond for September 11 detainees. An e-mail sent to Carpenter on November 20, 2001, by an INS attorney discussed the case of a detainee whose attempts to post the $4,000 bond set in late October 2001 by an Immigration Judge in the Newark District were rejected because the detainee's name appeared on the INS Custody List. The detainee's name had been placed on the list as a result of the "merger" of the New York and INS Custody Lists discussed in Chapter 4. The detainee filed a *habeas corpus* petition on November 19, 2001, and was allowed to post bond two days later.[67]

Carpenter recognized that her office and Pearson's office were giving INS employees conflicting advice. In a December 3, 2001, e-mail she explained that:

> We all recognize that there is a point at which the field will receive conflicting instruction from Genco [General Counsel] and Field Ops [Pearson's office]—that is where the attorneys are ethically bound (due to a lack of evidence) not to appeal or oppose the setting of a bond or voluntary departure. Where that does not coincide with the issuance of a Pearson letter—it ap-

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[67] *Habeas corpus*, which literally means "that you may have the body," refers to a legal pleading in which a federal court is requested to order a Government official to undertake a particular action. In this case, a federal judge would order the INS to release a particular detainee.

pears as though the attorneys are telling the field to release someone without a Pearson letter. What the attorneys are really telling the field is that the agency must release someone when there is no appeal pending and the alien has posted (or is attempting to post) the court ordered bond—since it lacks the legal authority to continue to detain the person.

According to Cooper, about 30 detainees were caught up in the conflict between Pearson's order and advice from the General Counsel's Office to allow detainees to post bond, primarily in October and November of 2001, but even as late as April 2002. Cooper said that when confronted with this dilemma, the INS was able to secure clearances for these detainees from the FBI generally from a few hours to several days.

## IV. OIG ANALYSIS

The Department decided immediately after the terrorist attacks to oppose bond for all aliens arrested in connection with the PENTTBOM investigation until they were cleared by the FBI, as a way to disrupt potential future terrorist attacks. As the weeks went by, two situations developed that should have led to a re-evaluation of this approach. The FBI's process for clearing September 11 detainees, originally envisioned as taking just a few days, was taking weeks and months. Also, as the Department learned more about the 762 September 11 detainees, the fact that many of these detainees were guilty of immigration violations alone, and were not tied to terrorism, should have prompted the Department to re-evaluate its original decision to deny bond in all cases.

The Department did not revise its approach for many months despite complaints by the INS about the problems it faced in bond hearings where it received no evidence from the FBI to tie the detained aliens to the September 11 attacks or terrorism. The INS raised the problem with officials in the Deputy Attorney General's office responsible for overseeing and coordinating INS issues. There is some difference as to whether this resulted in any substantial change in policy. Associate Deputy Attorney General Levey told the OIG that he thought he had addressed the INS's concerns by revising the Department's bond policy. He believed the revisions were satisfactory to the INS, and thus the revisions permitted detainees to be released on bond if the INS received no information from the FBI after the detainees' second continuance. However, our interviews and review of INS documents show that the policy was not changed to permit the INS to change its "no bond" position after the second continuance if there was no evidence provided by the FBI. While this written policy may not have accurately reflected the understanding reached between Levey and Cooper, the INS General Counsel, the policy continued to require FBI clearance.

The policy continued to place the INS in the untenable position of opposing bond unless it obtained a sign-off from FBI Headquarters stating that the FBI had no interest in the detainee, which was exceedingly hard to come by in the months immediately after the terrorist attacks. Thus, the INS still had to argue for "no bond" even when it had no information from the FBI to support that argument.

Although the INS appropriately raised this issue with Levey and other officials in the Deputy Attorney Gen-

eral's office, it did not press the issue at a higher level, which we believed the INS should have when it recognized that the policy remained unchanged. At a minimum and at an early stage, it should have written a legal memorandum that clearly spelled out its concerns and its position. As we describe in the next chapter, when it did write such a memorandum in January 2002, the "hold until cleared" policy was changed.

The provision of prompt, accurate information from the FBI for use in the bond hearings would have minimized the problems that arose with the "no bond" policy. Had the FBI devoted more resources to field investigations of these detainees and more resources at the SIOC to relay that information to the INS in a timely manner, some of these problems might have been avoided.

In addition, we found that the process developed by the INS to gather and "clear" information for use by INS District Counsel in opposing bond for September 11 detainees was exceedingly cumbersome. Given the swift pace of bond hearings stemming from the INS's initial "no bond" position for all September 11 detainees, asking District Counsel (who had little time to prepare for these hearings) to contact INS Headquarters, wait for the INS Bond Unit to receive a response from FBI SIOC agents to its request for a search of FBI files (where the FBI SIOC agents had to contact their local FBI field office for additional information), and then wait for approval from the SIOC before any of this information could be used (even non-classified information) was very time consuming. Consequently, INS officials in field offices told the OIG that they appeared in court with very little information to oppose bond in September 11 detainee cases.

Finally, while we recognize the importance of having a final check to ensure that detainees are released according to Department policies, INS employees believed they faced the choice of either violating a direct order from a senior INS official or a valid, unappealed bond order issued by an Immigration Judge. Given that efforts to "anticipate" bond hearings and produce "advance" letters continued to be inadequate to address the situation, the INS should have either revised the Pearson order or developed a more effective means of ensuring that it did not cause INS officials to violate an Immigration Judge's order.

## CHAPTER SIX

## REMOVAL OF SEPTEMBER 11 DETAINEES

Federal law provides that, in general, aliens found to have violated immigration law shall be removed from the United States within 90 days of when the alien is ordered removed. This chapter examines the issues raised by the Department's decision to delay removal of detainees with final removal orders and voluntary departure agreements, even after the 90-day removal periods had expired. In addition, we review the adequacy of the INS "custody reviews" that are required for any detainee held more than 90 days after an Immigration Court has issued a final order of removal.

### I. BACKGROUND

Section 241(a) of the Immigration and Nationality Act (INA) provides that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred

to as the 'removal period')." 8 U.S.C. § 1231(a)(1)(A). The statute provides exceptions when removal within the 90-day period is not possible (such as when the alien's country of citizenship will not accept the alien). It also permits detention to continue beyond the 90-day period for aliens charged with certain types of immigration violations who have not been removed, or where the Attorney General determines that the aliens present a risk to the community or a risk of flight.[68]

As noted in previous chapters, the Department directed the INS to detain aliens arrested in connection with the PENTTBOM investigation until they could be cleared by the FBI of connections to terrorism. According to INS attorneys, the fact that the FBI clearance process took longer than the time needed by the INS to prepare to remove the aliens (to obtain travel documents and make travel arrangements) posed a significant legal issue for the INS.

Early on, INS attorneys believed that the delay in removing detainees created a legal problem for the INS and the Department and said that they highlighted these concerns in meetings with officials from the Deputy Attorney General's office. However, these Department officials assert that the INS did not inform them of its belief that it was detaining aliens in violation of the law until January 2002, and when these Department officials became aware of this concern they changed the policy shortly thereafter.

Whether an alien could be held within the 90-day period when the INS is ready to remove the alien, as well as

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[68] 8 U.S.C. § 1231(a)(6).

whether the INS could hold an alien beyond the 90-day period in order to investigate the alien's possible ties to terrorism was the subject of differing opinions during the fall of 2001 and 2002. These issues are the subject of the Turkmen lawsuit, which is pending.[69] In a February 2003 opinion, the Department of Justice Office of Legal Counsel concluded that the INS can hold aliens beyond the 90-day removal period if the purpose is "related to effectuating the immigration laws and the nation's immigration policies."

This chapter describes the manner in which the issue was raised by those working on the detainee cases and concludes that the Department did not address the issue in a timely way. Once the legal issue was recognized by the Department as significant, however, the "hold until cleared" policy described in Chapter 4 was abruptly discontinued. In addition, we found many instances in which the cases of detainees held over 90 days were not reviewed, as required by the immigration regulations.

## II. DISCUSSION OF THE LIMITS OF THE INS'S DETENTION AUTHORITY

INS General Counsel Bo Cooper and Deputy General Counsel Dea Carpenter told the OIG that after September 11, the INS operated under the belief that legally it had 90 days (the "removal period") within which to remove an alien who had a final order of removal. Cooper also said the INS believed it could only use the entire 90-day period if the full 90 days were being used to "effectuate the removal." In other words, Cooper believed

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[69] See Turkmen v. Ashcroft, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

the INS could not delay removal of an alien for a reason "not related to removal." For example, Cooper believed that if it took the INS 85 days to obtain travel documents and make flight arrangements for an alien, then the INS could use 85 days of the 90-day removal period. However, if an alien was ready to be removed on the 30th day after receiving a final order, but another agency conducting a criminal investigation of the alien seeks to delay his removal, Cooper said he believed the INS could not use the remaining 60 days in the removal period to delay the alien's departure.

According to Cooper, he believed such a delay would be impermissible because the removal period is for the purpose of removing an alien from the country, and a delay exclusively attributable to a criminal investigation is not a delay "related to removal." Cooper said that he believed that in such a case the INS had no authority to continue holding the detainee if removal could otherwise be effectuated. Cooper stated that he recognized that it was "arguable" that consulting with another law enforcement agency to determine if custody should be transferred to that agency is "related to removal." Cooper told the OIG, however, that the slow pace of the FBI's detainee clearance process in the months after the September 11 attacks took the INS into "gray areas" in terms of its legal authority to continue holding detainees in custody, both within and beyond the 90-day removal period.

The conflict between the INS's interpretation of its legal authority to detain aliens with final removal orders and the Department's desire to maintain custody of these detainees until cleared by the FBI created a concern in the INS beginning as early as September 30, 2001, when

an INS attorney noted that detainees with final orders wanted to leave and were ready to leave. A series of e-mails between the INS's three Regional Counsels and Carpenter reflected the INS's internal debate about how to interpret and apply the statute's 90-day requirement to this circumstance. The central question discussed in these e-mails was whether the INS had 90 full days within which to effectuate removal, or whether the INS had to effectuate removal as soon as possible, but prior to the expiration of the 90-day period. One Regional Counsel held the view that within the 90-day removal period, the INS did not need to have any reason to hold an alien who had a final order, and stated that delaying removal to obtain clearance from the FBI would constitute a legitimate reason for delay under the statute. Another Regional Counsel held the opposite view.

Attorneys from the INS and the Department's Office of Immigration Litigation (OIL) told the OIG that beginning in mid-October 2001 they discussed questions about the INS's legal authority to detain aliens who had been issued final orders of removal and voluntary departure cases at SIOC Working Group meetings.[70] Either the Senior Counsel to the DAG, a former INS attorney who coordinated immigration issues along with Levey in the Deputy Attorney General's office, or another counsel who

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[70] As described in Chapter 2, the SIOC Working Group was an interagency group formed to coordinate efforts among the various components within the Department of Justice who had an investigative interest in or responsibility for the September 11 detainees. In addition to the FBI, the Working Group included staff from the INS, the Department's Office of Immigration Litigation (OIL), the Terrorism and Violent Crime Section (TVCS) of the Department's Criminal Division, and the Office of the Deputy Attorney General.

transferred from OIL in November 2001 to the Deputy Attorney General's office and who worked with Levey on immigration matters generally, attended these daily SIOC meetings between September and December 2001.[71] Notes taken by OIL attorneys during this period confirm that its representative in the SIOC Working Group raised concerns about the limits of the INS's detention authority as early as October 26, 2001.

In particular, one OIL attorney told the OIG he described at an October 26, 2001, SIOC Working Group meeting limits on the INS's legal authority to detain final order cases as a "problem." According to this attorney, he told participants at the meeting (including the Senior Counsel to the DAG), that the Government's obligations with respect to the 90-day removal requirement were "ambiguous." He described how the slow pace of the clearance process created a "high litigation risk" for the Department.[72]

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[71] In response to the draft report, the Senior Counsel asserted that she often missed the SIOC meetings due to other assignments, and that she attended "very few" meetings after the additional counsel joined the office in November 2001. In response to the report, Levey also stated that he generally did not attend SIOC meetings with "a few exceptions at the beginning of the process." As noted in Chapter 4, however, Levey was in attendance at a SIOC meeting on November 2, 2001, when the INS claims it raised concerns about the limits of its detention authority.

[72] Notes from the FBI OGC attorney assigned to the SIOC Working Group from that same date indicate that the 90-day issue was discussed in some detail at the meeting. According to these notes, an INS representative stated that there were "45 cases with final orders," dating to as far back as September 12. The notes also reflect that the INS representative stated that there is a 90-day removal period, and that there is a "split of opinion" as to whether the

By mid- to late-October 2001, an OIL attorney noted in an internal OIL document that 45 detainees on the INS Custody List already had final orders of removal or had been granted voluntary departure. INS and OIL staff working in the SIOC Working Group said that, at the time, they realized that the FBI clearance process was moving much slower than anticipated. The OIL attorney said he told Levey's staff that voluntary departure cases were even more problematic than final order cases in terms of the INS's legal authority to continue to detain the aliens.[73] He said he urged the FBI and INS

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INS's authority is "unfettered" during the 90-day removal period. The notes contain a notation: "clearances for removal—habeas fear" and reflect a comment that there is "some" additional time past 90 days, but the INS would "have to be trying to remove" the aliens. The notes also indicate that voluntary departure cases were discussed.

[73] An alien can avoid an order of removal by agreeing to voluntarily depart the country. 8 U.S.C. § 1229(c). To be eligible for voluntary departure, the alien must show that he or she has a readiness, willingness, and financial ability to leave the United States at his or her own expense; that he or she has good moral character for the previous five years; and that a favorable exercise of discretion is warranted. Id. The INS is not obligated to accept an alien's offer to voluntarily depart. If the INS agrees to the voluntary departure and the Immigration Judge grants it, the removal proceedings are terminated and the alien agrees to leave the United States on a specific date, under specific terms and conditions. Voluntary departure has some advantages over removal, both for the alien and the INS. A person who departs voluntarily is not barred from returning for 10 years, as is a person who is ordered removed. The INS also saves the expense of litigation (which may prolong detention) and transportation costs. Aliens who accept voluntary departure may remain in custody pending departure or may be released, depending on the particular circumstances. If an alien fails to

to place all final order cases on a "high priority list." The attorney told the OIG that his office was nonetheless prepared to defend any *habeas corpus* petitions that might be brought by detainees challenging their continued detention, and he believed that OIL had legal arguments upon which to base its defense.[74]

Several OIL attorneys said they informed members of the SIOC Working Group that the delays in removing aliens with final orders were creating an "increased litigation risk," were "inviting *habeas* petitions," and were "a bad idea." Two OIL attorneys said they urged the Department to speed up the FBI clearance process in order to address the issue of removing detainees with final orders.

Thomas Hussey, the Director of OIL, told the OIG that in late September 2001, he also raised, at a meeting with representatives of the Criminal Division and the Deputy Attorney General's office, the issue of detainees with final orders who were ready and willing to leave the United States but had yet to be cleared by the FBI. We confirmed this based on an e-mail exchange that occurred on February 7, 2002, between Carpenter, the INS's Deputy General Counsel, and an OIL attorney in which Car-

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depart by the specified date, the voluntary departure order converts to a final order, which carries with it the 10-year bar to re-entry.

[74] For example, in the Zadvydas case, which involved aliens whose countries of origin would not accept them, the Supreme Court stated that the "presumptively reasonable" detention period was six months. The Court also stated in Zadvydas, "In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal from the United States." Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

penter informed the OIL attorney of two *habeas* petitions filed by detainees held after voluntarily departure had been granted. According to the OIL attorney's response:

> Our and INS's SIOC representatives have repeatedly sought to move the growing number of aliens in the WTCP [World Trade Center/Pentagon] pool who have taken or are subject to final orders, and particularly those who are approaching 90 or more days out. Thom [Hussey] anticipated the problem in one of the earliest WTCP meetings in ODAG [Office of the Deputy Attorney General]. What tends to happen now is that *habeas* filings by such aliens move them to the immediate attention SIOC list, and final clearance then tends to happen before we have to file a merits response.

OIL attorneys told the OIG they also raised concerns about the extent of the INS's detention authority with respect to specific detainee cases. For example, on December 19, 2001, the OIL supervisor sent an e-mail to other OIL attorneys noting that the staff in the Deputy Attorney General's office he spoke with about a particular case agreed that a *habeas corpus* petition should move the detainee "to the head of the CIA line" for clearance. The e-mail also said that the Deputy Attorney General's staff agreed with his assessment that the INS's failure to release certain detainees raised potential liability issues for the INS. The e-mail stated that the counsel in the Deputy Attorney General's office had:

> returned my call to [the Senior Counsel in the DAG's office] on these two [aliens who had filed the petition] and the larger issue. She said the similarly situated number is 180 (correcting the 200 number I threw

> out), the CIA has cleared about 120 of them, and 2 weeks ago promised quick action on the remaining 60 (whatever quick means, but she agreed that a habe[as] moves the alien to the head of the CIA line, or should —but who communicates that to the CIA?). She indicated that they ([the Senior Counsel]) agree with our legal authority assessment and that Bivens etc is a prospect. . . . She knows nothing about any HQ-type order that might be imposing these holds, other than [the Senior Counsel]/Stewart [Levey]'s verbal directive to get the cases through the CIA checks where possible.

A review of other documents also tends to support the INS's contention that it raised legal concerns about the extent of its detention authority and that attorneys in the Deputy Attorney General's office were aware of these issues. For example, e-mails from INS attorneys stated that the issue was repeatedly raised in SIOC Working Group meetings, which were often attended by staff from the Deputy Attorney General's office. In addition, INS officials interviewed by the OIG stated that Levey and other members of the Deputy Attorney General's staff were aware during the fall of 2001 that continuing to hold detainees who had obtained a final removal order or voluntary departure order presented a potential legal problem for the INS.[75]

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[75] The INS also asserted that the case of Zacarias Moussaoui brought to Levey's attention the INS position on the limits on its authority to detain aliens with final orders who could be removed to their country of origin. Carpenter, the INS Deputy General Counsel, explained to the OIG that, due to his entry into the United States through the Visa Waiver Program, Moussaoui was ordered removed pursuant to summary proceedings. On November 14, 2001, accord-

Levey and his Senior Counsel disputed the assertion that they were made aware of the legal issue regarding the limits of the INS's detention authority.[76] They told the OIG that while they were aware that individual detainees had final removal orders in the fall of 2001, they

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ing to Carpenter, Levey suggested the possibility that Moussaoui be placed into "regular" removal proceedings (versus summary proceedings), in order to start the process of removal again, and increase the time he could be held on the immigration violation. The INS advised that the removal proceeding could not be started over, and that if the INS continued to hold him on the final order, it risked a potentially successful *habeas* petition. The INS cited this exchange as evidence that Levey was aware of the INS's view that final order cases had strict time limitations within which the INS was required to effectuate the removal.

By contrast, Levey stated that this was an example of how the process worked—that a problem was identified and then solved. He did not agree that the Moussaoui case brought to his attention the general problem of INS time limits on its authority to detain aliens with final orders. Levey noted that he had a meeting to discuss the Moussaoui case scheduled with the Criminal Division for November 13, the day before this conversation with the INS apparently took place. He acknowledged that the discussion likely was prompted by the realization that Moussaoui was nearing 90 days after his order of removal. But he stated that the case did not raise, in his mind, a concern about other detainees who might be nearing 90 days after their orders of removal because he believed Moussaoui was an unusual case given that he was already in post-order detention on September 11. Levey said he did not realize at the time that other detainees were, or would soon be, similarly situated. He also stated that the fact that the INS contacted him about this case would have reinforced his "reasonable expectation" that the INS would bring other cases to his attention if they were "approaching a legal deadline."

[76] Levey wrote in his response to the draft report that, in his opinion, what the INS had failed to bring to his attention was its belief that it was "acting beyond its legal authority."

did not know that this situation presented a legal issue for the INS until they received a draft letter from the FBI in late January 2002 (discussed below) which stated that the FBI would concur in a decision to release a detainee (even when the clearance investigation was not complete) if the INS had determined that it had no legal basis to justify continued detention.

The Senior Counsel told the OIG that she was aware that aliens were accepting orders of removal and voluntary departure. She noted that she contacted the FBI agent assigned to the SIOC Working Group on December 11, 2001 (90 days after the PENTTBOM arrests began). She stated that the FBI agent told her that the "kinks" in the CIA check had been worked out and that they were "now caught up."[77] The Senior Counsel and Levey also both noted that, on December 19, 2001, Victor Cerda, the INS Chief of Staff, stated in an e-mail that the Department should "sell on the fact that the process is working, people are not being detained indefinitely in secret locations, and once no link or negative info[rmation] is determined after careful investigation, they are being processed in the normal course, often resulting in bond being posted and their release."[78]

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[77] The Senior Counsel said that she was not aware of substantial delays in the FBI's analysis of that CIA information, which had to be completed before detainees could be cleared. She also was not aware that the Special Agent whom she contacted was responsible for sending the name trace requests to the CIA and for forwarding the CIA responses to the FBI analysts. However, he was not responsible for the completion of the analysis of the CIA responses. See Chapter 4.

[78] Both the Senior Counsel and Levey point to this e-mail as evidence that the INS was satisfied with the clearance process and that

Prior to learning of the legal problem identified in the FBI's letters, Levey claimed he saw the area as presenting more of a "procedural" problem. He said he heard the INS's concerns more as complaints about the slowness of the clearance process than legal concerns, so he said he addressed the concerns by working to improve the clearance process. He described himself as an "advocate" for the INS in that regard. While he acknowledged that the INS may have mentioned the "litigation risks" presented by the detentions, he said that a warning such as that would not have been an effective means of informing him that the INS thought it was either in violation of the law or would soon be acting in violation of the law.

Levey told the OIG that the issue was not raised to him as a "legal" problem, as opposed to a procedural issue, until the DAG's Senior Counsel did so in January 2002. Levey explained in his response to the draft of this report that he assumed that the INS could hold an alien for 90 days after a final removal order. He told the OIG that he did not know that the INS believed that, in certain circumstances, it had less than 90 days. He said that once it was raised, he immediately did what he was told the law required—allow the INS to remove detainees whose 90-day removal period had expired. He said that before then he did not understand that the INS

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it did not raise legal concerns to the INS. However, Cerda's e-mail was a suggested addition to a Public Affairs officer's proposed language to accompany a public release of updated INS detainee figures. According to Cerda, he clearly and emphatically expressed his concerns about the limits of the INS's detention authority to members of the Deputy Attorney General's office throughout the fall of 2001.

believed it was acting beyond its legal authority. Both Levey and the Senior Counsel stated that, up until that point in time, they had never asked themselves the question "as a matter of law, how long can we hold these aliens with final orders of removal or voluntary departure orders?"[79]

## III. DETAINEES' LAWSUITS

Between October and December 2001, several September 11 detainees with final orders of removal and voluntary departure orders had filed lawsuits, or threatened to file lawsuits, to challenge their continued detention. The following are examples of cases in which detainees challenged their continued confinement:

- Two September 11 detainees filed a lawsuit against the Department in the Northern District of Ohio on December 18, 2001, when the INS did not allow them to leave the country after they had received voluntary departure orders from an Immigration Judge. Two weeks prior to filing the petition for release, the detainee's attorney wrote the INS asking, among other things, "[u]nder what specific legal authority does the INS and/or the Department of Justice propose to prohibit these young men from returning home?" The INS did not respond to the attorney's questions. The attorney filed the December 18, 2001, *habeas corpus* petition asserting that it was unlawful for the United States to prohibit the detainees from leaving the country.

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[79] Levey asserted that he had no reason to ask himself this question because he said he was not informed until January 2002 that aliens were being detained for more than 90 days.

The next day, the detainees received final clearances from the FBI and were permitted to leave the country.

- A September 11 detainee who received a voluntary departure order from an Immigration Court had until November 23, 2001, to leave the country. However, that date passed with the INS refusing to release the detainee because FBI Headquarters had not issued a clearance letter because it had not received the CIA checks. Consequently, the INS District Director extended the time for the detainee's voluntary departure past November 23, 2001, to prevent the voluntary departure order from converting to a removal order (which would result in more restrictive consequences to the detainee).

  The detainee's attorney filed a *habeas corpus* petition seeking his release on November 27, 2001. An e-mail from an INS Bond Unit attorney to an official at INS Headquarters noted that while the INS attorney handling the case in the district had made the "eminently reasonable" assumption that the detainee "must be a serious criminal or terrorist," that assumption was not correct. The Bond Unit attorney explained that "the only reason [the detainee] remains on the list is for the CIA to run checks. It had been in that posture for at least two weeks." He wrote that "there is no evidence [the detainee] is a terrorist or is of interest to the FBI." In an earlier communication, the attorney had stated "how should the Service [INS] proceed. Should the Service continue to hold an individual for whom there is a final order, is on hunger strike,

> and for whom the FBI has no interest, in order for an administrative function to be completed, when that function is for reasons unknown to me, taking in excess of two weeks?"
>
> The acting director of the National Security Law Division forwarded the Bond Unit attorney's comments to Cooper, the INS General Counsel, and noted that this detainee's case was discussed regularly by the SIOC Working Group. Another INS attorney noted in an e-mail to a Regional Counsel that the alien's attorney had "threatened to go public and tell the Islamic community not to cooperate with the government . . . because the only thing that will happen is that they would be locked up indefinitely. The timing of this is horrible, coming as it does in the middle of the Attorney General's effort to interview all those other folks."[80] The alien was removed from the United States on December 4, 2001.

These examples indicate that the INS generally avoided addressing the substantive legal issues raised in the *habeas corpus* lawsuits by obtaining FBI Headquarters's clearance for an individual detainee who had filed a legal action before a formal response was needed on the merits. The INS first would argue that the detainees failed to exhaust all administrative remedies, thereby avoiding the primary legal question of whether the Department had legal authority to continue holding these detainees until the FBI could complete its clearance investigations. However, other aliens in similar

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[80] This apparently refers to the FBI's plan to conduct voluntary interviews of 5,000 foreign visitors.

circumstances, who did not have attorneys or had attorneys who did not file *habeas* petitions, remained in custody.

Witnesses from the FBI, the INS, the Criminal Division, and OIL stated that the *habeas* cases were a top priority for the Department, and that members of the Deputy Attorney General's office were aware of the issues in these cases, including the legal claims brought by the aliens challenging the INS's authority to detain them. Staff members for the Deputy Attorney General's office dispute this. For example, the Senior Counsel in the DAG's office told the OIG that she does not recall being aware of the details of the *habeas* petitions, nor does she recall any of the petitions raising the 90-day issue.

## IV. POLICY CHANGE ALLOWING DETAINEES TO BE REMOVED WITHOUT FBI CLEARANCE

In January 2002, the Department changed its position as to whether the INS should hold aliens after they had received final orders of removal or voluntary departure orders until the FBI had completed the clearance process.

On January 18, 2002, an attorney working in the INS Commissioner's office requested a meeting with the Deputy Attorney General's Senior Counsel to discuss how to handle the final order cases that had not been cleared by the FBI.[81] Five days later, on January 23, 2002, the INS faxed a list containing 54 detainees who had been

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[81] The Senior Counsel told the OIG that the request did not contain any words that conveyed a sense of urgency. According to her, the e-mail seemed to be innocuous.

held more than 90 days after receiving final removal or voluntary departure orders. INS officials provided a copy of this list to all SIOC Working Group members, including OIL, the FBI, and the Senior Counsel from the Deputy Attorney General's office, and the Working Group discussed these cases at a meeting the next day.[82]

At the same time, the INS General Counsel's Office completed a legal opinion regarding its interpretation of the limits of its authority to detain aliens with final orders of removal within the 90-day removal period. The INS had been working on this opinion since October 2001. The legal opinion, formatted as a memorandum, was addressed to Pearson, the INS Executive Associate Commissioner for Field Operations. Carpenter, the INS Deputy General Counsel, and Cerda, the INS Chief of Staff, told the OIG that the opinion was faxed to Levey's office on the day it was issued, January 28, 2002. However, Levey and his counsels stated they did not see the opinion until many months later.

The INS written opinion concluded that the INS has a duty to remove an alien with "reasonable dispatch" and

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[82] The Senior Counsel to the DAG told the OIG that legal concerns about the limits of the INS's detention authority with respect to final order and voluntary departure cases were not raised at this meeting. OIG interviews with the FBI OGC's representative at the SIOC Working Group suggest that the INS's concerns were being conveyed at the SIOC meetings to members of the Working Group, including the Deputy Attorney General's Counsel, with some urgency during this time frame. According to the FBI OGC representative, her increasing "discomfort" with respect to the final order issue caused her to brief the FBI General Counsel in December 2001, and caused her to draft the letter from FBI Director Mueller to the INS on January 28, 2002, discussed in detail later in this chapter.

the removal could not be delayed for the exclusive purpose of allowing the FBI to conduct an investigation to see if the person is a terrorist. The "Summary Conclusion" of the opinion stated:

> The INS has the authority to detain an alien with a final order of removal during the 90-day removal period as long as the INS is acting with reasonable dispatch to arrange the removal of the alien from the United States. This authority may be called into question if the INS cannot establish that it diligently pursued the steps necessary to remove the alien. Section 241(a)(2) of the Immigration and Nationality Act (INA) states that the INS had the authority to detain an alien with a final order of removal for up to 90 days, the length of the removal period. However, case law provides that detention must be related to removal and cannot be solely for the purpose of pursuing criminal prosecution. While there is no bar to the government's continuing a criminal investigation during the removal period for possible prosecution of the alien, the INS must also be proceeding with reasonable dispatch to arrange for removal and the investigation for criminal prosecution cannot be the primary or exclusive purpose of detention.

At the same time the INS was drafting this legal opinion, FBI officials were growing concerned as more and more September 11 detainees passed the 90-day mark after receiving final removal orders without being cleared. After reviewing the Supreme Court decision that addressed limits on the detention of aliens who could not be returned to their country of origin in the "fore-

seeable future,"[83] the FBI attorney representative to the SIOC Working Group said she was concerned that the September 11 detainees were being held longer than permitted under the law. She said she also became increasingly troubled by the fact that the INS was looking to the FBI as the agency responsible for extending the length of the detainees' confinement and the fact that the INS was not seeking travel documents until clearance letters were received from the FBI. She was also concerned about the upcoming INS custody review process. She said that the slow pace of the FBI clearance process was due to an FBI "staffing issue." However, she said the INS had not told the FBI "you have to let them [the detainees] go," and she believed that the INS had allowed the situation to get to the point where dozens of detainees had been held beyond their initial removal periods or voluntary departure dates.

The FBI attorney also told the OIG that in December 2001 she briefed FBI General Counsel Larry Parkinson that detainees were filing *habeas corpus* petitions to protest their confinement and that she thought there was very little upon which to defend the case for continuing to detain the aliens. She told Parkinson that her efforts to "prioritize" detainees so that those with final orders would receive FBI clearances within the 90-day period had been unsuccessful. Parkinson subsequently briefed FBI Director Mueller on the problem. When interviewed by the OIG, Director Mueller could not recall this particular briefing, but did not dispute that it occurred.

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[83] Zadvydas v. Davis, 533 U.S. 678 (2001).

As several more weeks went by and the issue remained unresolved, with Parkinson's approval, the FBI attorney sought to clarify the FBI's position with respect to detainees with final removal orders. She therefore drafted a proposed letter for FBI Director Mueller to send to INS Commissioner Ziglar that stated, "If the INS has determined that there is no legal basis justifying continued detainment of that alien, the FBI concurs with the INS's determination to permit the individual to be removed." Previously, the FBI's position, and that of the Department, was that the INS should wait for results of the FBI clearance investigation before releasing or deporting any September 11 detainee. On January 28, 2002, the same day the INS states that it circulated its legal opinion about holding the detainees during the 90-day removal period, the attorney circulated her draft letter to her supervisor and the FBI General Counsel, as well as to the counsel to the DAG. At a subsequent meeting that, according to the FBI attorney, was attended by the Senior Counsel to the DAG, INS Chief of Staff Cerda, and an INS NSLD attorney, the letter was discussed and a decision was made that it would not be formalized and sent by the FBI to the INS.[84]

The additional counsel to the DAG, who worked on immigration matters along with the Senior Counsel to the DAG, stated that the issue of limits on the INS's detention authority was raised at a January 28, 2002, SIOC Working Group meeting she attended. She said she told the FBI attorney that the law was unclear, but to

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[84] After reviewing a draft of this report, the Senior Counsel told the OIG that she does not recall such a meeting and does not believe such a meeting took place.

be on the "safe side" the INS should proceed with removal as soon as possible. Her notes appear to indicate that the FBI, the Terrorism and Violent Crime Section, and the Deputy Attorney General's office made an initial decision at this meeting to permit the INS to release detainees with final orders of removal who had not received FBI clearance.

The Senior Counsel told the OIG that when she read the FBI's draft letter it was the first time she became aware that the INS faced a legal issue involving how long it could detain an alien who had a final order of removal. She told the OIG that she then raised the issue with Levey immediately. She said she and Levey discussed the possibility of allowing aliens with final orders to be removed without FBI clearance with officials from the INS, FBI, and Criminal Division. This discussion, according to the Senior Counsel, was prompted by the indication in the FBI letter that detaining aliens after they had received final orders was unlawful.[85]

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[85] In response to a draft of our report, the Senior Counsel said that when the other counsel to the DAG obtained a copy of the letter from an INS attorney, they and Levey immediately called Cerda. She said that during that call, Cerda did not mention the January 28, 2002, INS opinion regarding the limits on the INS's authority to detain aliens with final orders of removal within the 90 day removal period. The Senior Counsel stated that she did not see a copy of the INS opinion until October 2002. She told the OIG that if she had been informed that the INS was working on such an opinion, her office would have convened a meeting of representatives from INS, OIL, the Office of Legal Counsel (OLC), and the Office of the Solicitor General to discuss the legal issues and advise the Department on the correct interpretation of the law. She told the OIG that when her office requested an opinion on the issue from OLC in the fall of 2002 with respect to a particular case, her office received oral advice

Levey said he agreed to revise the Department's policy to allow the INS to remove aliens with final orders without FBI clearance. Levey told the OIG that he could not recall whether he consulted with any higher-level officials in the Deputy Attorney General's office or the Attorney General's office before deciding to change what had been Department policy for almost five months. The Senior Counsel's notes indicate that Levey stated on January 29, 2002, "The law is the law, change the policy."[85] Levey also stated that he verified that the Criminal Division and the FBI did not oppose this change.

The Attorney General told the OIG that he was unaware of people being detained inordinately long after a deportation order. He also stated that he had no recollection of the INS telling him of any concern that aliens were being detained against the law.

The Senior Counsel distributed new procedures to the INS, FBI, OIL, and Criminal Division in an e-mail on February 6, 2002. According to her e-mail, the INS was instructed to fax to the FBI and Criminal Division at the end of each day information on the day's hearings and the results of each hearing. The INS then would be able to proceed with removal of aliens with final orders without giving the FBI or Criminal Division any additional notice. If the FBI or Criminal Division had a particular interest

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"within a few weeks" that the detention in question was legal. OLC's February 2003 opinion is discussed in more detail later in this chapter.

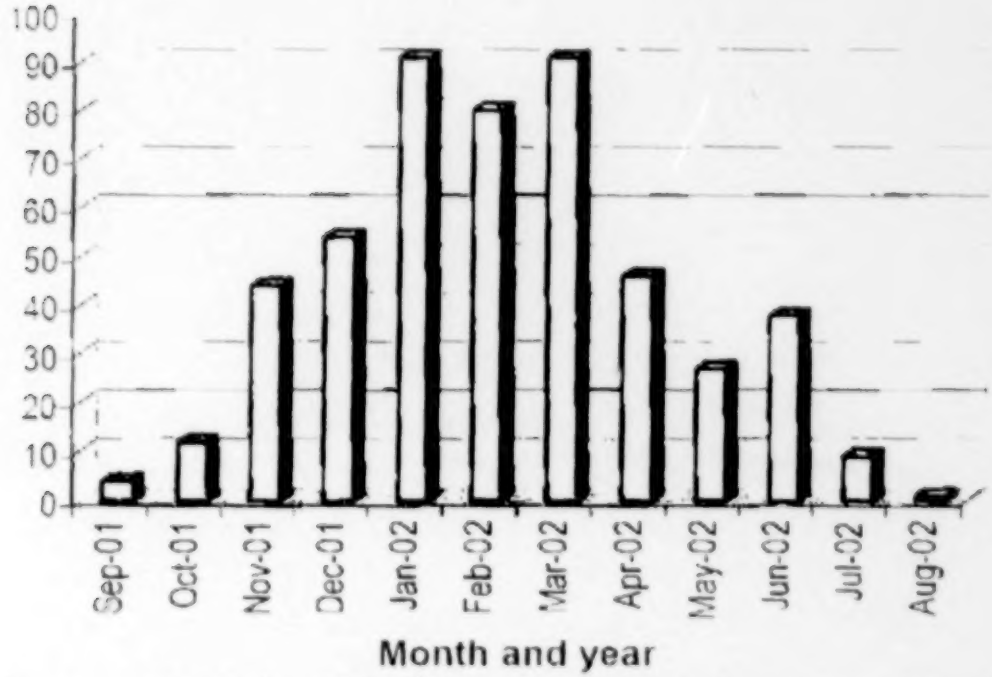
[86] The Senior Counsel and Levey point to this notation from January 29, 2002, as evidence that they had been unaware of the legal issue prior to that date, and that they took quick action once the FBI letter raised it to their attention.

in a case, they were to contact the INS about it. The INS would prioritize the cases with final orders over 90 days to allow those aliens to be removed. The FBI continued the clearance process, but the INS did not have to wait for a clearance letter in order to remove a detainee who was otherwise ready to go.

Many of the September 11 detainees with final orders were not removed immediately because the INS had not yet requested travel documents for them. Because travel documents are only valid for a limited period, the INS had not requested documents in advance since they might expire before the FBI clearance had arrived. After the policy change, in early February 2002 the INS requested travel documents for detainees whose removals had been held up due only to their lack of FBI clearance. By August 2002, the majority of the aliens on the INS Custody List either had been released or removed.

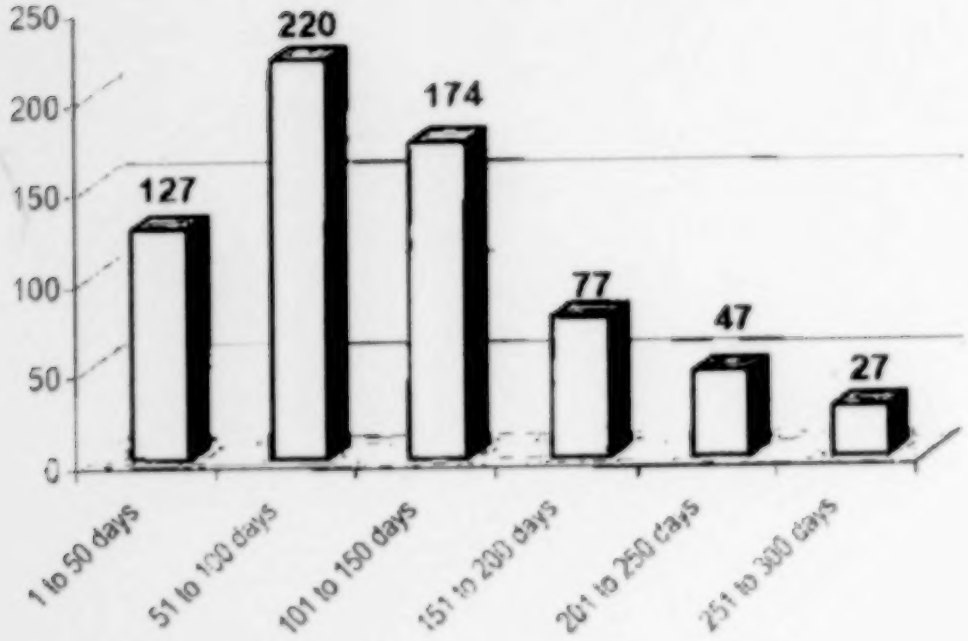
The following charts show the timing of when September 11 detainees were removed and the number of days from their arrest to their removal or release.

**Figure 8**
**Detainees Removed per Month**




Note: 197 of the 762 detainees were released on bond, leaving 565 detainees. Of the 565, 68 had no release or removal dates. Consequently, the data in the chart represents 497 detainees not released on bond.

**Figure 9**
**Number of Days from Arrest Date to Removed/Released Date**




*Number of missing values = 90

## V. OLC OPINION

In the fall of 2002, the Deputy Attorney General's office asked the Office of Legal Counsel (OLC) to address two legal questions concerning the timing of removal of a detainee subject to a final order of removal under section 241(a) of the Immigration and Nationality Act (INA):

1) Whether the Department is under an obligation to act with reasonable dispatch in effecting an alien's removal within the 90-day removal period established by the INA; and

2) Whether and for what purposes the Department may refrain from removing the alien beyond the 90-day period.

The OLC conducted its analysis in the context of an alien who had received a removal order in October 2002 and whose 90-day removal period expired in December 2002 without his being removed. The OLC opinion stated that insufficient information existed at first to press criminal charges or to transfer the detained alien to military custody as an enemy combatant. The OLC opinion stated that the question presented was whether the alien's removal could be delayed to continue the investigation concerning his al Qaeda connections.

The OLC issued its memorandum opinion on February 20, 2003. The opinion concluded that, contrary to the opinion of the INS General Counsel, the INA by its terms grants the Department the full 90 days to effect an alien's removal and imposed no duty to act within any particular speed within the 90-day period. The OLC opinion stated, however, that the Department's ability to remove an alien within the 90-day period is not entirely unconstrained and "must be supported by purposes related to the proper implementation of immigration laws." The OLC stated that although its opinion did not have to provide a comprehensive assessment of what purposes were "related to the proper implementation of immigration laws," it concluded that investigating whether an alien has terrorist or criminal connections was related to the proper implementation of immigration laws.

The OLC opinion also concluded that it was permissible for the Department to take more than 90 days to remove an alien, even when the alien could be removed within 90 days, if the delay was related to affecting the immigration laws and the nation's immigration policies. Again, the opinion did not describe all the circumstances that would meet this test, but it concluded that investi-

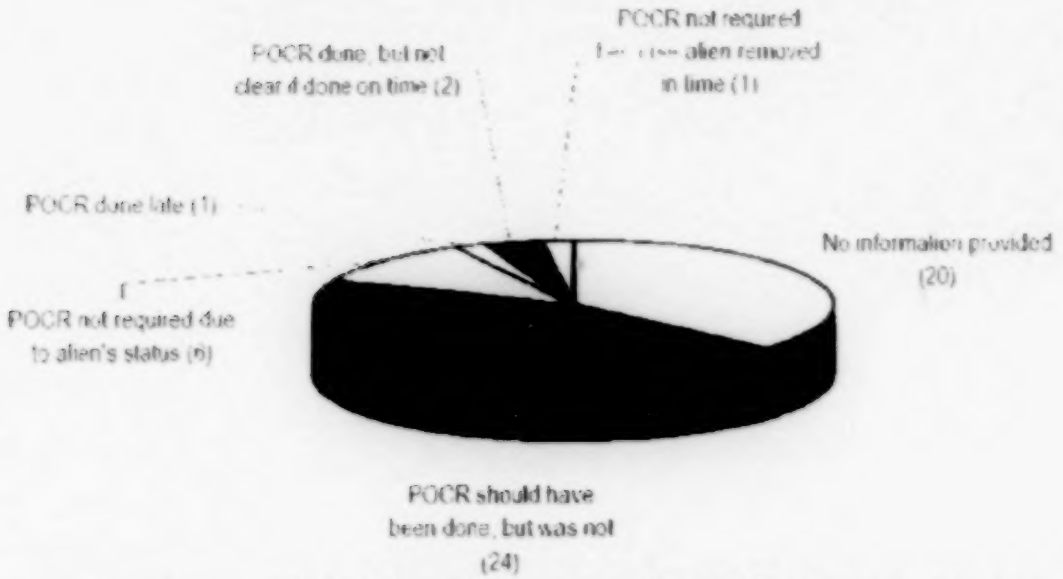
gating whether an alien has terrorist connections met the test.

## VI. POST-ORDER CUSTODY REVIEWS OF SEPTEMBER 11 DETAINEES

We found that the September 11 detainees who were held by the INS beyond 90 days after their final orders of removal did not receive a Post-Order Custody Review (POCR) as required by regulation. According to 8 C.F.R. § 241(4(h)(5), aliens held for 90 days after a final order of removal are, by INS regulation, entitled to custody reviews to determine if their continued custody is warranted. Several witnesses told the OIG that these POCRs were not conducted for September 11 detainees.

To examine this issue, we requested information on POCRs for the 54 detainees on the January 23, 2002, list prepared by the INS of aliens with final orders who had been held more than 90 days. We found that, for the most part, the INS failed to conduct POCRs for these September 11 detainees as required by the regulations. For 20 of the 54 cases in this sample, the INS was unable to provide any information related to POCRs. For another 24 detainees in the sample, the INS data shows that POCRs should have been completed but were not. For six additional detainees, the INS noted that POCRs were not required because the aliens had obtained voluntary departure orders. The INS said it removed one additional alien before his POCR was due, it completed one POCR two weeks late, and it completed two reviews without documenting whether the INS was within the deadline imposed by the regulation.

**Figure 10**
**Information Regarding Post-Order Custody Reviews**




When we asked the INS to explain the lapses in conducting POCRs for September 11 detainees, a Special Counsel in the INS OGC cited several reasons. First, he said because the INS was unable to remove detainees on the INS Custody List until they were cleared by the FBI, INS District officers may have believed there was no purpose in performing the custody reviews. In addition, he said a number of aliens moved in and out of INS custody at different points in time and this probably led to confusion. Finally, he cited problems caused by the tremendous workload on INS staff in the New York and Newark Districts stemming from the PENTTBOM investigation.

## VII. OIG ANALYSIS

In the aftermath of the September 11 attacks, whether the INS legally could hold September 11 detainees after they had received final orders of removal or voluntary departure orders to conduct FBI clearance investi-

gations was the subject of differing opinions. A February 2003 OLC opinion concludes, however, that the INS can do so if the delay is related to the proper implementation of immigration laws, including investigating whether the alien has terrorist or criminal connections. A pending lawsuit also is addressing this issue.

Regardless of the outcome of that lawsuit, our review found that the INS and the Department did not address this issue in a timely or considered fashion. For many months, detainees were being held, even beyond 90 days, despite their willingness to leave the country. Some INS attorneys had doubts about the legality of preventing the September 11 detainees from leaving the country not only after 90 days had passed, but even within the 90-day removal period if the alien was willing to leave and arrangements could be made to remove the alien. INS and OIL attorneys asserted that they raised their concerns about the limits of the Government's detention authority at various meetings, and we found evidence that they did. Yet, despite their concerns about the issue, as time passed and the issue was not addressed, the INS did not raise these concerns at a higher level. On such an important issue, considering the significant doubts that these attorneys harbored about the legality of the policy, we believe the INS had a responsibility to press the issue clearly—and in writing—if it believed that the policy presented a legal issue for the Department. It did not do so until January 2002, almost five months after the issue first arose.

By the same token, we concluded that attorneys in the Deputy Attorney General's office who were responsible for coordinating these immigration issues had enough information to realize that this was a significant legal

issue that needed to be addressed. The evidence indicates that Associate Deputy Attorney General Levey and his counsels attended meetings at the SIOC Working Group when the legal concerns regarding the extent of the INS's authority to detain aliens with final orders of removal were raised. While they stated they did not know that the final order and voluntary departure cases presented a legal problem (as opposed to a procedural problem) until late January 2002, we concluded that there was sufficient discussion and information about this issue that they should have considered earlier the limits on the Government's authority to hold detainees with final removal orders, both within the 90-day period and after the 90-day period.[87] These issues also were raised by *habeas corpus* petitions and questions posed in the media and by Congress to Department officials. We believe the Department's senior officials with day-to-day responsibility for immigration issues should not have missed the fact that continued detention of aliens who had final orders presented an important legal issue. Further, we believe the Department should have squarely addressed this issue, well before the end of January 2002 when the policy was changed.

In response to the draft of this report, Deputy Attorney General Thompson stated that it is important to take account of the circumstances and atmosphere in the

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[87] After reviewing a draft of this report, Levey clarified that he was not aware until late January 2002 that the INS "believed it was acting unlawfully." He acknowledged that the INS had raised concerns about detaining the aliens, but asserted that INS officials did not do so in a "coherent or appropriate" way that communicated their concerns about these final order cases with any "transparency or urgency."

Department during this time period. He wrote that the period after the September 11 attacks was one of tremendous intensity, as the Department was required to alter its central mission to prevent further acts of terrorism. He noted that his staff was required to respond, in a crisis atmosphere, to hundreds of novel issues; had to shoulder a monumental task and an enormous workload; and had a great number of other responsibilities during this period as part of a comprehensive effort to protect the United States from further acts of terrorism. He wrote:

> The detention of those illegal aliens suspected of involvement with terrorism was paramount to that mission. My staff understood that the immigration authorities of the Department should be used to keep such people in custody until we could satisfy ourselves—by the FBI clearance process—that they did not mean to do us harm.
>
> Given those circumstances, I respectfully submit that it is unfair to criticize the conduct of members of my staff during this period. In light of the imperative placed on these detentions by the Department, I would not have expected them to reconsider the detention policy in the absence of a clear warning that the law was being violated. It is clear in the Draft Report that that did not occur until January 2002. When the issue was squarely presented, it is apparent that they promptly did the right thing: they changed the policy.

[The full text of his letter is included at Appendix K.]

We recognize the circumstances surrounding the response to the September 11 attacks. We agree that

there were enormous demands on the Deputy Attorney General's staff—and on the entire Department—after the September 11 attacks, as the Department reoriented its mission and acted to prevent further attacks of terrorism. Yet, we believe that the Department, particularly staff in the Deputy Attorney General's office who were responsible for coordinating immigration issues, should have carefully considered before January 2002 such a critical issue as the extent of the Department's authority to hold detainees who had been issued final orders of removal, both up to and beyond the 90-day removal period. As we have pointed out above, we also agree that the INS could have, and should have, raised these issue more clearly and in writing before January 2002.

But the evidence indicates that concerns about the extent of the INS's detention authority were, in fact, raised by the INS and OIL attorneys before January 2002. We also conclude that the attorneys on the Deputy Attorney General's staff who were responsible for coordinating immigration issues should have been on notice of these issues not only because of the concerns expressed by INS and OIL attorneys at various meetings, but also because of the issues raised by the Moussaoui case, the *habeas corpus* petitions, and questions that were being raised publicly by Congress and the press. The authority of the Department to hold detainees after they received final orders of removal was not a hidden issue. We believe that, notwithstanding their significant responsibilities and the circumstances and atmosphere of the time, the Department attorneys responsible for coordinating immigration issues should have addressed squarely and earlier the issue of the

Department's authority to hold detainees up to and beyond 90 days from when they received final orders of removal.

Finally, with respect to the custody reviews, the regulations clearly require the reviews and the INS should have conducted them in a timely manner.

## CHAPTER SEVEN

## CONDITIONS OF CONFINEMENT AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK

### I. INTRODUCTION

Almost 60 percent of the 762 aliens detained in connection with the Government's investigation of the September 11 terrorist attacks were arrested in the New York City area. As discussed previously, the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated.

Aliens arrested by the INS on immigration charges who were deemed by the FBI to be of "high interest" to its terrorism investigation were held in high-security federal prisons across the country, such as the Federal Bureau of Prisons's (BOP) Metropolitan Detention Cen-

ter (MDC) in Brooklyn, New York.[88] Overall, the BOP confined 184 September 11 detainees in its facilities nationwide. A total of 84 detainees determined by the FBI to have a possible connection with the PENTTBOM investigation or terrorism in general were housed at the MDC from September 14, 2001, to August 27, 2002.

Generally, aliens deemed by the FBI to be "of interest" or "of undetermined interest" to the Government's terrorism investigation were detained in lower security facilities, such as the Passaic County Jail in Paterson, New Jersey (Passaic). From September 2001 to May 2002, 400 September 11 detainees were confined in Passaic.

This chapter examines the conditions of confinement for September 11 detainees held at the MDC, while the next chapter examines conditions experienced by September 11 detainees at Passaic. As we discuss in these two chapters, the FBI's initial assessment of its level of interest in specific September 11 detainees directly affected the detainees' conditions of confinement within the institution and their access to telephones, legal counsel, and their families.

In this chapter, we discuss the BOP's initial communications blackout after the terrorist attacks; its classification of September 11 detainees as "witness security" inmates; the MDC's administrative maximum (ADMAX) Special Housing Unit (SHU), a special high-security section of the facility where September 11 detainees were

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[88] The MDC is a 9-story BOP facility in Brooklyn that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing. On December 10, 2002, the MDC housed 2,441 men and 181 women.

held until cleared by the FBI of involvement with terrorism; the MDC's process for transferring September 11 detainees from the ADMAX SHU to the facility's general population; the detainees' access to legal counsel; allegations of physical and verbal abuse made by detainees against MDC staff; and other condition of confinement issues, including consular visits, recreation opportunities, medical care, and lighting conditions in the ADMAX SHU cells.

## II. INITIAL COMMUNICATIONS BLACKOUT AFTER SEPTEMBER 11

Immediately after the September 11 attacks, the BOP ordered all detainees who were "convicted of, charged with, associated with, or in any way linked to terrorist activities" to be placed in the highest level of restrictive detention. Also, MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's "call." Detainees held in the MDC's ADMAX SHU were subjected to the most restrictive conditions of confinement authorized by BOP policy, including "lockdown" for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls.

Hawk Sawyer told the OIG that the detainees were held under these restrictive detention conditions, in part because the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities. She said the policies applied to the September

11 detainees were not new policies created specially for the detainees. Rather, the policies were longstanding BOP practices for housing inmates who presented special security concerns. She noted that on any given day persons are detained by the BOP in conditions exactly like those applied to the September 11 detainees.

Hawk Sawyer informed the OIG that the Department did not initially give the BOP any guidance on how to confine the detainees. However, she said the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, called her during the weeks after September 11 with concerns about detainees' ability to communicate both with those outside the facility and with other inmates. Hawk Sawyer said she discussed specific September 11 detainees during these conversations as well as the detainees in general. Hawk Sawyer stated that Laufman's and Wray's concerns about the detainees' ability to communicate both with those outside the facility and with other inmates confirmed for her that the BOP's initial decision to restrict detainee communications with persons outside the facility and to isolate them from the general inmate population and from each other was appropriate.

Hawk Sawyer also told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications—including legal and social calls or visits—as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department offi-

cials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

Laufman, Chief of Staff to the Deputy Attorney General, confirmed the substance of the conversations described by Hawk Sawyer. He told the OIG that he urged the BOP to exercise the full scope of its discretion to sequence detainee outside contacts on the "back end" of the BOP's discretion. Wray stated that when he contacted Hawk Sawyer about some specific criminal inmates connected to terrorism who were already in BOP custody at the time of the September 11 attacks, he discussed having these inmates placed under the most secure conditions possible. He stated that while he does not recall giving any specific instructions, he stated that the "spirit" of his comments was that the BOP should, within the bounds of the law, push as far toward security as they could.

On September 12, 2001, David Rardin, the BOP's Northeast Region Director (which includes the MDC), directed wardens in his region not to release inmates classified by the BOP as "terrorist related" from restrictive detention in SHUs "until further notice." Rardin also ordered a communications blackout for September 11 detainees during a telephone conference call with all Northeast Region Wardens on September 17, 2001. Consequently, MDC staff did not allow detainees to receive telephone calls, visitors, or mail, or to place telephone calls or send mail until the BOP received information concerning the security risks presented by the detainees.

We could not determine with any certainty the length of the communications blackout that affected September 11 detainees in BOP facilities. However, based on multiple witness interviews, the blackout appears to have lasted from several days to several weeks. According to Michael Cooksey, the BOP Assistant Director for Correctional Programs, all September 11 detainees initially were held incommunicado, but after 8 to 10 days detainees were permitted limited attorney and social contacts. John Vanyur, Senior Deputy Assistant Director in the BOP's Correctional Programs Division, told the OIG that the detainees had no external contacts for the first few weeks after the terrorist attacks until the BOP received more information on the September 11 detainees being held in BOP facilities.

Fifteen of the September 11 detainees we interviewed who were placed in the MDC between September 14 and October 16, 2001, told the OIG that this "communications blackout" continued until mid-October 2001.[89] The detainees said that during this period, MDC staff did not permit them visitors, legal or social telephone calls, or mail.

The BOP, in comments submitted to the OIG after reviewing the draft of this report, stated that "at no time did the [BOP] prohibit detainees from sending outgoing mail" that would have informed detainee attorneys and family members where they were being held. Our interviews with MDC staff and September 11 detainees and BOP

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[89] Because the September 11 detainees did not have calendars or clocks in their ADMAX SHU cells, during their interviews with the OIG most of the detainees estimated dates when specific events occurred.

documents contradict this assertion. For example, a conference call between the Eastern Regional Director on September 20, 2001, and various wardens (including MDC Warden Zenk) re-established legal visits, legal telephone calls, and legal mail for the September 11 detainees. However, detainees continued to be denied social visits, non-legal telephone calls, and non-legal mail until approximately mid-October 2001.

By the same token, the detainees' recollections that the communications blackout lasted until mid-October 2001 conflicted with MDC records showing detainees meeting with some consular officials and attorneys in early October 2001. On October 1, 2001, Cooksey issued procedures to all BOP facilities housing September 11 detainees that should have ended the communications blackout that had been imposed on the detainees.[90] This memorandum permitted "legal mail, legal calls, and legal visits for September 11 detainees in accordance with written Bureau (BOP) policy." Yet, even though this communications blackout was supposed to be lifted by Cooksey's October 1 memorandum, the way the BOP classified September 11 detainees created significant restrictions on access to detainees, which we describe below.

## III. IMPACT OF DETAINEE CLASSIFICATION

### A. Detainees' Classification

The BOP initially classified all September 11 detainees it housed as Witness Security, or WITSEC, in-

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[90] "Guidance for Handling of Terrorist Inmates and Recent Detainees," October 1, 2001, memorandum from Michael B. Cooksey, Assistant Director, Correctional Programs Division, BOP.

mates.[91] Witness Security inmates generally are individuals who agree to cooperate with law enforcement, judicial, or correctional authorities by providing evidence against persons or groups involved in illegal activities. Because their cooperation with the Government can place their lives in jeopardy, the BOP takes significant precautions to ensure the safety of WITSEC inmates. Accordingly, any information about WITSEC inmates is closely guarded, such as their identity, location, and status.

Normally, the arresting agency would inform the BOP of the person's status and the need for WITSEC protection, but the BOP classified the detainees in this category without any individual assessment of the circumstances of their arrests.

When applied to the September 11 detainees, the WITSEC classification resulted in MDC officials withholding information about the detainees' status and location. This made it very difficult for attorneys, family members, and, at times, law enforcement officers to visit September 11 detainees or even determine their location. For example, because information on WITSEC inmates is

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[91] See September 21, 2001, memorandum from Cooksey to BOP Regional Directors and Wardens categorizing September 11 detainees as "General Population WITSEC" in the BOP's SENTRY system. SENTRY is the BOP's database for monitoring the movement and management of all BOP inmates. BOP management was uncertain about the potential security risks posed to BOP staff and to other BOP inmates by the September 11 detainees. They believed that they needed to provide a greater measure of security for the September 11 detainees. The WITSEC categorization, with its accompanying additional security provisions, provided BOP management with a quick, "off-the-shelf" methodology to address their security concerns.

so strictly protected, staff who worked at the MDC's reception desk did not know specific detainees were confined at the MDC and often told people inquiring about a September 11 detainee that the detainee was not being held at MDC when, in fact, he was. The MDC reception staff instead would refer the caller or visitor to the BOP's National Locator systems for information about the detainee.[92] Yet, because WITSEC inmates are not listed in the BOP's National Locator systems, people who accessed the registry to inquire about September 11 detainees were unable to obtain any information about where a particular detainee was being held.

The OIG interviewed four attorneys who each represented a September 11 detainee housed at the MDC about their initial efforts to contact their clients. Three of the attorneys told us that they were informed by MDC front desk staff at some point that their clients were not pre-

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[92] Members of the public have access to at least two resources to obtain information about inmates—including September 11 detainees—in the BOP's custody. The first resource, the Inmate Locator on the BOP's website (www.bop.gov), allows people to search the BOP database using a variety of criteria, including the inmate's name and BOP or INS number. When a match is made, the Inmate Locator provides the following information: the inmate's name; BOP Register Number; age; race; sex; projected release date; date released; and the name of the BOP facility holding the inmate. The information, which comes from the BOP's main inmate database, is updated daily with data on both sentenced and pre-trial inmates. The second public resource, the BOP Telephone Inmate Locator, provides callers with information on federal inmates. To obtain inmate information, the caller must have any one of the following criteria to provide to a BOP operator: BOP Register Number; U.S. Marshals Service Number, FBI Number, DCDC Number, or INS Number; or the inmate's first and last names and age.

sent at the MDC when, in fact, their clients were being held in the facility at the time. One attorney told us that when she went to the MDC to attempt to locate her client, MDC staff checked their "system" and informed her that her client was not housed at MDC. After she complained, another MDC employee came to the front desk, informed the attorney that her client was in the MDC, and authorized her to meet with him.

Another attorney told the OIG that he went to the MDC after front desk staff had informed his paralegal that his client was not housed at the facility. The attorney said he provided the MDC front desk staff with numerous combinations of his client's name, which contained five different parts. The attorney said he again was told that his client was not housed at the MDC. The attorney also visited the INS's Varick Street Service Processing Center in Manhattan in a failed effort to locate his client. In fact, his client was in the MDC at the time.

In addition to lifting the initial communications blackout for September 11 detainees, Cooksey's October 1, 2001, memorandum established a new inmate classification that was used for the September 11 detainees—Management Interest Group 155 (Group 155)—in part to address the lack of information the BOP was providing to attorneys and family members about the detainees. However, Cooksey's October 1 memorandum directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be "reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist

activities."[93] As a result, the BOP continued to use "WITSEC" as its primary designation for September 11 detainees and "Group 155" as a secondary designation. Therefore, the tighter restrictions that flowed from the WITSEC designation continued to apply to all September 11 detainees, and difficulties that families and attorneys had trying to locate the September 11 detainees continued.

Four senior managers at BOP Headquarters, including Senior Deputy Assistant Director John Vanyur, acknowledged to us that the BOP's initial designation of September 11 detainees as WITSEC inmates caused administrative confusion. The MDC Warden's Executive Assistant told the OIG that briefings for MDC staff in the weeks after the terrorist attacks did not provide clear guidance about how to handle inquiries from the public about September 11 detainees, particularly to staff assigned to the visitors' desk in the MDC's front lobby. MDC Warden Michael Zenk and the MDC Associate Warden for Programs both confirmed that staff at MDC's front desk had turned away visitors—including attorneys—who sought to contact September 11 detainees because of confusion surrounding the WITSEC/Group 155 designation initially assigned to the September 11 detainees.[94]

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[93] According to Cooksey's October 1 memorandum, all detainees who entered the MDC "on or after September 11, 2001" and "may have some connection to or knowledge of" the events of that day or terrorism activities, were to be housed "in the Special Housing Unit [SHU]" in the "tightest" allowable conditions until cleared by the FBI.

[94] Dennis Hasty was the MDC Warden at the time of the September 11 attacks and was replaced by Zenk in April 2002.

The WITSEC designation also impeded law enforcement interviews of September 11 detainees. MDC staff told the OIG that several law enforcement officials in the New York area who called the MDC to schedule detainee interviews shortly after the terrorist attacks were told that a particular detainee was not housed at the MDC. To address this problem, MDC staff established a process under which law enforcement officers contacted staff in the MDC Command Center or one of the Lieutenants responsible for supervising the ADMAX SHU in advance of their arrival to schedule an interview and to ensure that the September 11 detainee was housed at the MDC.

In response to the continuing confusion about access to the detainees and obtaining information about the detainees, the BOP established another new classification for September 11 detainees. In an October 31, 2001, memorandum, Cooksey removed the WITSEC designation for September 11 detainees in SENTRY, the BOP's inmate tracking database, but the Group 155 assignment continued to apply to the detainees. After October 31, when MDC staff at the front reception area searched for a September 11 detainee in SENTRY, a warning message referred to the detainee as a "SPECIAL SIS CASE." The staff was therefore alerted to contact the MDC's Special Investigative Supervisor (SIS), who determined whether the visitor had been cleared to meet with the detainee.

However, problems persisted even after this second re-classification because of the BOP's initial decision to classify September 11 detainees as WITSEC inmates. As late as March 1, 2002, the Captain of the ADMAX SHU e-mailed the MDC Warden and officials at BOP

Headquarters requesting that September 11 detainees no longer be categorized as WITSEC inmates in the SENTRY system.[95] According to the Captain, the WITSEC designation was unnecessary and caused "confusion . . . at times attorneys are being turned away."

### B. MDC's Special Housing Unit (SHU)

Because of the policy that all September 11 detainees were to be held in the most restrictive conditions at BOP facilities, they were placed in the MDC's Special Housing Units (SHU). In BOP institutions, SHUs are designed to segregate inmates who have committed disciplinary infractions or who require administrative separation from the rest of the facility's population.[96] According to BOP regulations, an employee called the Segregation Review Official is required to review the status of each inmate housed in the SHU on a weekly basis after the inmate has spent seven days in disciplinary segregation or administrative detention. In addition, that official is required to conduct a formal hearing every 30 days to assess the inmate's status.[97]

We found that the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings monthly to assess the detainee's status. Rather, it relied on the FBI's assessment of

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[95] The Captain is the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU. The Captain reports to the Associate Warden for Custody, who reports to the MDC Warden.

[96] BOP Program Statement 5270.07, Discipline and Special Housing Units.

[97] The 30-day review is documented on the BOP Special Housing Review form.

"high interest." We reviewed the monthly SHU reports for the September 11 detainees we interviewed and found that each was annotated with the phrase "continue high security." MDC officials told the OIG that, if they did not receive notification from BOP Headquarters that the FBI had cleared a September 11 detainee, the detainee's monthly report was automatically annotated with the phrase "continue high security," without a hearing being conducted, and the detainee remained in segregation.

In addition, the September 11 detainees were housed in the most restrictive type of SHU—an Administrative Maximum (ADMAX) SHU. According to BOP officials, ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal SHU are usually sufficient for correcting inmate misbehavior and addressing security concerns. An ADMAX SHU has more restrictive conditions than a normal SHU. For example, the ADMAX SHU at the MDC, unlike a regular SHU, has a four-man hold restraint policy, handheld cameras recording detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.[98]

Conditions in the ADMAX SHU differ markedly from conditions in the MDC's general population. In the general population, inmates are allowed to move around the unit and use the unit's telephones. They also are not subjected to the movement and restraint policies enforced in the ADMAX SHU. In addition, detainees in the gen-

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[98] The structure and policies of the MDC's ADMAX SHU are discussed in more detail later in this chapter.

eral population are permitted certain electronic equipment in their cells, such as small radios.

By contrast, as we describe below, detainees in the ADMAX SHU are restricted to their cells, have limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff. Several September 11 detainees who spent time in the ADMAX SHU before being moved to the MDC's general population described the difference as "between night and day."

Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU. After the September 11 terrorist attacks, MDC staff contacted staff from the BOP's Metropolitan Correctional Center (MCC) in Manhattan for assistance in establishing an ADMAX SHU.[99] The MDC quickly created an ADMAX SHU from one part of its existing SHU. This ADMAX SHU was only partially operational when the first September 11 detainees arrived on September 14, 2001. According to MDC officials, the unit became fully operational by October 15, 2001, when MDC management distributed operating procedures to staff assigned to the ADMAX SHU.

Each wing has 31 cells and a capacity of 60 inmates per wing. The wings are divided into two blocks of cells called "ranges." September 11 detainees were housed in individual cells in the SHU range that was converted to an

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[99] The MCC in Manhattan had created an ADMAX SHU after one of its correctional officers was seriously injured by a terrorist housed in the MCC's regular SHU who had been convicted of involvement in the 1998 embassy bombings in Kenya and Tanzania.

ADMAX SHU. As more detainees were transferred to the MDC, two and at times three detainees were housed in a single cell in the ADMAX SHU. MDC staff told the OIG that as many as 60 detainees were housed in the ADMAX SHU at one time.

In an effort to improve security, the MDC also initiated a series of structural changes to the ADMAX SHU in early October 2001 that were completed in mid-November 2001. The changes included:

- Heavy iron grillwork was installed between the SHU area housing September 11 detainees and the area housing inmates in other SHU ranges;
- Two stationary security cameras were installed in each ADMAX cell, each mounted on the wall at ceiling height. The MDC previously had installed cameras for viewing the range hallway in front of the SHU cells. Monitors for viewing the cameras in the corridors and the new cameras installed in the cells were located in the officer-in-charge's room; and
- A video camera mounted on a tripod or held by an MDC staff member was used to record all movement of September 11 detainees. Video recording equipment, linked to the stationary cameras in the cells, was located in a locked room adjacent to the ADMAX SHU.

The cells in the ADMAX SHU contained a set of bunk beds, toilet and sink fixtures, a shower, and a small seating area.

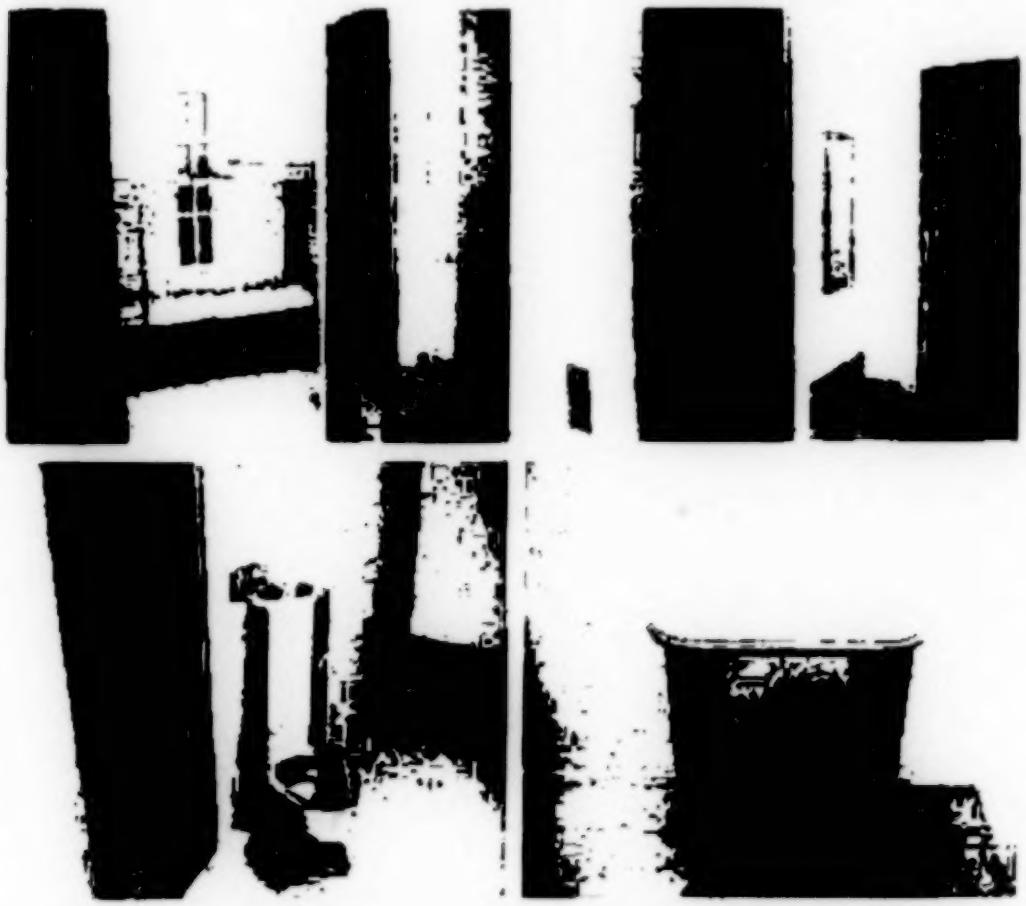

**Image 1:** These pictures depict a typical ADMAX SHU cell and show (moving clockwise from top left) the bunk bed, shower, seating area, and combination toilet and sink fixture. *Photographs dated May 1, 2002.*

Detainees and MDC staff used a multipurpose room located at the end of the ADMAX SHU range for medical examinations, strip searches, recreation, and individual meetings.

**Image 2:** This picture shows a multipurpose room on the ADMAX SHU range that is equipped for detainee medical examinations. *Photograph dated May 1, 2002.*

A modified food preparation area was located between the ADMAX range and the regular SHU ranges on the MDC's ninth floor. Normally, inmate food at the MDC is served on hard plastic trays, but food for the September 11 detainees was transferred to foam plates to prevent the detainees from using plastic trays as weapons.

The recreation area in the ADMAX SHU consisted of four cell bays enclosed by chain link fencing on all sides and the ceiling. The roofs of the four recreation cells, located on the top floor of the MDC, were open to the outside. Due to security concerns, MDC staff did not provide recreation equipment to September 11 detainees housed in the ADMAX SHU.

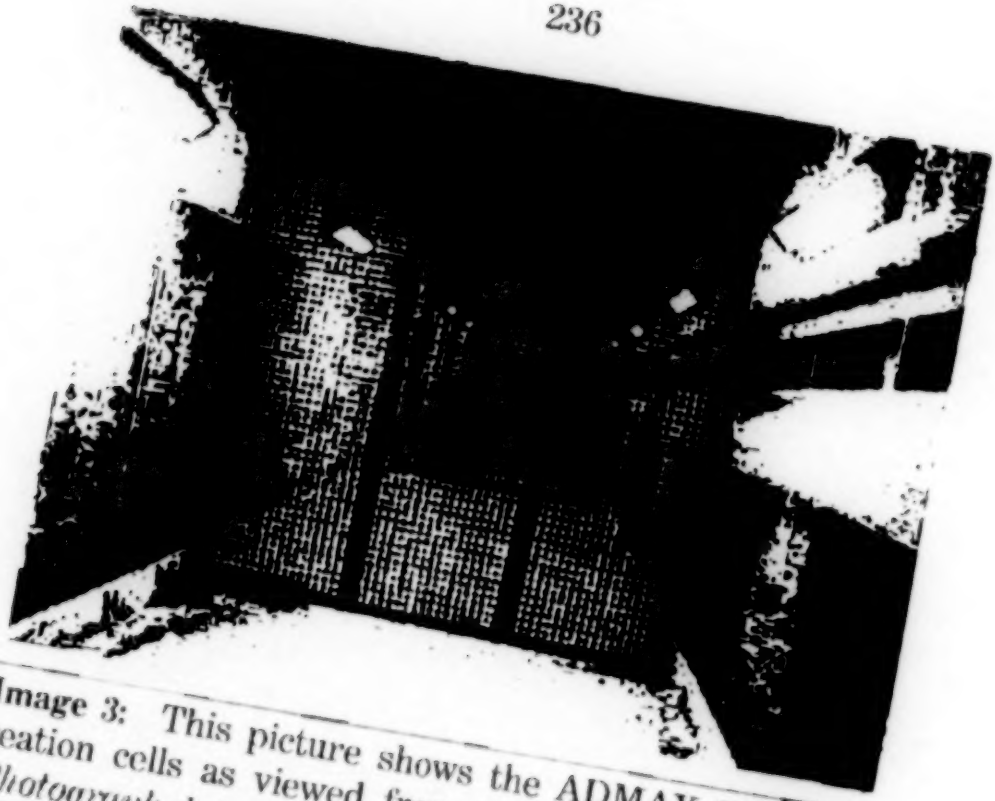

**Image 3:** This picture shows the ADMAX SHU recreation cells as viewed from the last recreation cell. *Photograph dated May 1, 2002.*

Visitors, attorneys, and family members met with September 11 detainees in a special visitation area adjacent to the ADMAX SHU range. All visits between detainees and their attorneys or family were "non-contact," meaning physical contact between parties was prevented by a clear partition. Correctional officers were not present in the special visitation areas during these visits.

**Image 4:** These photographs show two views of the non-contact visiting area used by September 11 detainees in the ADMAX SHU. *Photographs dated May 1, 2002.*

Law enforcement visitors to the ADMAX SHU were permitted contact visits with September 11 detainees in a separate visiting area across from the non-contact area.

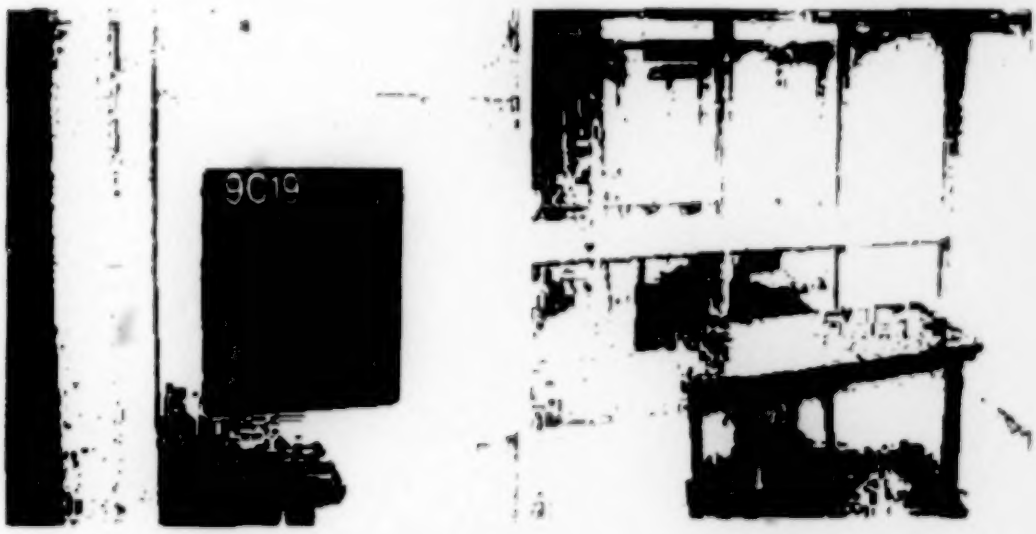


**Image 5:** These pictures show two views of the contact visiting area in the ADMAX SHU. *Photographs dated May 1, 2002.*

### C. ADMAX SHU Policies and Procedures

Officials at the MDC combined existing BOP policies for disciplinary segregation and administrative detention to create policies and procedures governing September 11 detainees housed in the ADMAX SHU.[100] The following procedures were implemented for these detainees on September 20, 2001:

- One social telephone call a month;
- One legal telephone call a week;
- A correctional counselor was required to stand in front of the cell while detainees completed all telephone calls (according to BOP officials, this was done for security purposes and not in an effort to monitor the detainee's conversation);
- All requests to use the telephone had to be made using a "copout" form, which we describe below;
- Legal and social visits, except by law enforcement officers, were non-contact;

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[100] Disciplinary segregation has more restrictive conditions than administrative detention. For example, an inmate in disciplinary segregation is entitled to one social telephone call a month, while an inmate in administrative detention is entitled to one social telephone call a week. Administrative detention is considered non-punitive and is used to house either inmates who pose a threat to themselves or facility staff, or inmates in protective custody. According to BOP Program Statements, administrative detention is designed for short periods of time unless the inmate requires long-term protection or presents "exceptional circumstances, ordinarily tied to security or complex investigative concerns."

- Detainees remained in restraints while out of their cells. The MDC imposed three different restraint policies on the September 11 detainees:
  - Routine escort: handcuffs and leg irons;
  - When required to sign forms, be interviewed, or for visitation: handcuffs, leg irons, and "Martin Chain" (approximately four feet of heavy chain that links the leg irons to the handcuffs);
  - When escorted from the institution: handcuffs, handcuff cover with padlock, Martin Chain, and leg irons.
- Three staff members and one Lieutenant were present each time a detainee was placed into restraints and escorted from a cell. During this "four-man hold," one of the staff members was required to operate the portable video camera; and
- Detainees remained in restraints during non-contact visits with attorneys or family members.

### D. Detainee Complaint Process

September 11 detainees had two methods to make a request or file a complaint about their treatment or conditions at the MDC—the "copout" and the Administrative Remedy Program. The copout, a process in which detainees identify concerns to MDC staff, was the primary method for detainees to request telephone calls (social and legal), medical care, or resolution of visitation problems.[101] The copout, while not an official complaint pro-

[101] BOP Program Statement 5511.07, Inmate Request to Staff.

cess, was used by detainees to request staff assistance for a variety of issues.

In contrast, the Administrative Remedy Program is the BOP's formal process for filing a complaint, such as an allegation of physical or verbal abuse against facility staff. Detainees (or inmates) are expected to exhaust all informal methods for resolving their concerns, such as submitting copouts, before filing complaints under the Administrative Remedy Program.[102]

## IV. HOUSING ASSIGNMENT OF SEPTEMBER 11 DETAINEES

### A. Assignment of September 11 Detainees to the ADMAX SHU

As described above, the MDC did not follow the BOP's inmate security risk assessment procedures for determining where to house the September 11 detainees. Instead, MDC officials relied on the FBI's assessment that the detainees generally were "of high interest" to its ongoing terrorism investigation and automatically placed them in the MDC's most restrictive housing conditions—the ADMAX SHU.

The first September 11 detainees arrived at the MDC on September 14, 2001. Initially, Dennis Hasty, the MDC Warden at the time, and the former Associate Warden for Custody told us they were under the impression that the MDC would be asked to house only about 16 September 11 detainees, the capacity of one block of SHU

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[102] BOP Program Statement 1330.13, Administrative Remedy Program.

cells if each detainee was housed individually.[103] However, the number of September 11 detainees sent to the MDC soon exceeded their original expectations as the FBI arrested additional aliens and classified them "of high interest." At the time, the MDC was the only detention facility in New York City operational and suitable for housing detainees under highly restrictive conditions.[104]

Officials from the BOP's Northeast Region and BOP Headquarters told MDC staff that they believed that September 11 detainees who were sent to the MDC were "suspected terrorists." However, as discussed previously, from our interviews and document reviews we determined that the FBI did not have a formal process for making an initial assessment of a detainee's possible links to terrorism, and this assessment lacked specific criteria and was applied inconsistently. The BOP's Northeast Region Counsel explained to the OIG that the BOP accepted this assessment, since the BOP normally takes "at face value" FBI determinations that detainees had a potential nexus to terrorism and therefore were "high-risk."

Under standard BOP practice, newly arrived inmates are kept separate from an institution's general inmate

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[103] A 17th cell along the block was used for isolation purposes (e.g., an inmate on suicide watch). This isolation cell had bars traversing the front of the cell so that correctional staff could view the occupant at all times. Each of the other 16 SHU cells had a solid door with a small window.

[104] The MCC in Manhattan had an ADMAX SHU. However, because of security and logistical concerns associated with its proximity to the World Trade Center, the MCC did not accept new inmates during the weeks after the attacks.

population for the first 30 days while staff conducts risk assessments to determine whether the inmates can be released safely into the general population. We found no evidence that MDC staff performed any of the normal risk assessments on the September 11 detainees, because the detainees were assigned automatically to the ADMAX SHU.

### B. Reassigning September 11 Detainees to the General Population

We found that even after September 11 detainees who had been placed in the ADMAX SHU were finally "cleared" by the FBI, some remained in the ADMAX SHU for days or weeks after they were supposed to be transferred to the MDC's less restrictive general population.

#### 1. Centralizing the Notification Process

As discussed in Chapter 4, prior to October 1, 2001, the FBI New York Field Office and the INS New York District Office developed their own procedures to clear local September 11 detainees using staff who served on the New York Joint Terrorism Task Force (JTTF). When the FBI liaison to the New York JTTF told the INS and BOP liaisons that the FBI had no further investigative interest in a particular detainee, the BOP liaison drafted a clearance memorandum to the MDC Warden or Captain. When the Warden received this memorandum, the detainee could be "normalized" (i.e., released to the general population).[105]

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[105] A copy of such a memorandum is attached as Appendix J.

However, this process did not occur quickly, even after the FBI cleared the detainee. According to the OIG's data analysis, before October 2001, the MDC received notification that the FBI had cleared a September 11 detainee an average of 15 days after the FBI's New York Field Office had actually cleared the detainee.

On October 1, 2001, the process for transferring the detainees from the ADMAX SHU to the general population was centralized to BOP Headquarters in Washington, D.C. Under the new process, the FBI's New York Field Office informed FBI Headquarters that a detainee was no longer of investigative interest to its terrorism investigation. Subsequently, staff in the International Terrorism Operations Section at FBI Headquarters coordinated CIA checks for detainees before issuing clearance memoranda.

The BOP employee who served as a liaison to FBI Headquarters during this period told the OIG that he generally checked with the FBI on a daily basis for new clearance memoranda for September 11 detainees.[106] The liaison said that once a clearance memorandum was issued, he notified the Intelligence Section at BOP Headquarters, either by e-mail or in his weekly report, that the FBI had cleared a specific September 11 detainee. Staff in BOP's Intelligence Section then prepared a memorandum from Cooksey, the BOP's Assistant Director for Correctional Programs, to the Warden of the

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[106] The BOP liaison stated that he checked with the FBI daily until the end of April 2002, by which time the number of September 11 detainees held in BOP facilities was drastically reduced. The liaison said that starting in May 2002 he monitored the issuance of FBI clearance memoranda once or twice weekly.

BOP institution in which the detainee was held. The "Cooksey memorandum," as it became known, formally notified a BOP Warden that a detainee was no longer considered "high risk" and that his conditions of confinement could be normalized.

After the FBI and BOP implemented this centralized process, the time it took for a BOP facility to receive notice that an inmate was no longer considered "high risk" lengthened. Our analysis found that the MDC received notice from BOP Headquarters, via a Cooksey memorandum, an average of 32 days after the FBI New York Field Office had cleared a September 11 detainee. The range of these cases varied from a minimum of 7 days after the FBI New York Field Office's clearance for one detainee to 109 days for another detainee.

BOP officials told us that they would not transfer a September 11 detainee to an institution's general population prior to receiving the FBI clearance notification via the Cooksey memorandum. We found inconsistencies in this policy, which we discuss in the next section. Moreover, BOP officials explained that the process to transfer an inmate to the general population after receiving clearance could take several days. The Cooksey memorandum permitted the MDC to assess detainees using normal BOP policies to place them in appropriate housing. After receiving a memorandum on a particular detainee, the MDC conducted its own assessment of the detainee, and BOP officials said it took time to review records and interview correctional officers as part of this assessment. BOP officials told us that they were aware of two detainees who unintentionally were left in the ADMAX SHU after the MDC received the Cooksey memorandum, due

to administrative errors. They also stated that they were aware of a third detainee who received a Cooksey memorandum but remained in the ADMAX SHU because of disciplinary problems.

The efficiency of the FBI clearance process and the length of time it took BOP Headquarters to notify the MDC of a detainee's clearance were significant because they dictated when a September 11 detainee could be released to the MDC's general population, where detention conditions were markedly less restrictive.

### 2. Inconsistencies in Detainee Reassignment Procedures

We also found that the MDC inconsistently applied the Cooksey memorandum process for transferring September 11 detainees from the ADMAX SHU to the general population. Of the 53 detainees in our MDC sample, 23 received Cooksey memoranda; 20 never received Cooksey memoranda; and 10 were cleared using the local procedures in effect prior to centralization of the process at FBI and BOP Headquarters on October 1, 2001. Of the 20 detainees who never received Cooksey memoranda, 14 were transferred from the MDC,[107] 5 were released into the general population without FBI clearances,[108] and 1 was released on bond.

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[107] Detainees removed from the institution were returned to INS custody, transferred to another BOP institution, or removed from the United States. One detainee in our sample was released on bond.

[108] We asked MDC management for an explanation for why detainees were released into the general population without FBI clearances. They were unable to provide an explanation.

Our analysis of the 23 detainees in our MDC sample who received Cooksey memoranda determined that FBI Headquarters took an average of 107 days to clear the detainees of any connection to terrorism, and the MDC received this notification an average of 24 days after the detainee was actually cleared by FBI Headquarters.[100] In response to OIG questions, BOP management offered no explanation for why it took, on average, more than one month to issue Cooksey memoranda after the FBI had cleared the September 11 detainees.

Our analysis of the records of the 23 detainees who received a Cooksey memorandum showed that 4 of the 23 detainees were released into the general population prior to a Cooksey memorandum being received. Further, three of these four detainees did not have FBI clearances prior to being released into the general population. While it is possible that the MDC could have learned that a detainee had been cleared by the FBI from a source other than a Cooksey memorandum, such deviation from the standard procedure is noteworthy given the BOP's adherence to other rules developed to ensure that the September 11 detainees did not present a risk to the facility's staff or other inmates.

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[100] The time it took the MDC to release the inmate into the general population, after the FBI clearance was received, ranged from 5 to 119 days in our sample. In the 119-day case, the detainee had entered the MDC on October 4, 2001, and was cleared by the FBI on December 19, 2001. However, he was not released to the MDC's general population until April 17, 2002. According to Warden Zenk, the detainee's continued confinement in the ADMAX SHU for 119 days after he was cleared by the FBI "was due to an administrative error" on MDC's part and was uncovered after BOP Headquarters performed an audit of September 11 detainees.

**Case Study 1:**

A September 11 detainee arrested in New York City arrived at the MDC on November 5, 2001. More than six months later, on May 16, 2002, the FBI officially determined that the detainee was of "no investigative interest" regarding the September 11 attacks or terrorism in general. However, a BOP Intelligence Liaison in the SIOC at FBI Headquarters wrote that "due to an internal FBI admin-[istrative] error," notification from the FBI to the BOP that the detainee had been cleared was not received by the BOP until June 13, 2002.

The Cooksey memorandum for this detainee issued by BOP Headquarters arrived at the MDC on June 14, 2002. The detainee was released into the MDC's general population later that same day, more than seven months after his arrest and almost one month after the FBI had cleared him.

## V. ACCESS TO LEGAL COUNSEL

This section examines the access to counsel afforded September 11 detainees while housed in the MDC. We focus on the policies and procedures implemented by the MDC that affected these detainees' access to counsel. We also examine how the MDC's initial communications blackout and the detainees' WITSEC classification affected the availability of legal calls, access to pro bono attorney lists, and the ability of their attorneys to meet with them.

### A. Legal Telephone Calls

We found that the BOP's decision to house September 11 detainees in the most restrictive confinement condi-

tions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel.

Under applicable BOP policies, MDC officials had significant discretion to determine the frequency and length of the detainees' legal telephone calls. Yet, we found that the MDC adopted procedures for September 11 detainees more appropriate for pre-trial inmates who had obtained counsel prior to their detention, rather than for individuals like the September 11 detainees, the vast majority of whom had no legal representation upon arriving at the MDC and needed to secure counsel.[110]

The BOP's national policy on attorney telephone calls states that inmates should be afforded the opportunity "to place an occasional unmonitored call to his or her attorney . . . frequent calls should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate." BOP regulations do not specify an acceptable number of inmate legal telephone calls, nor does the policy define what level of attorney communication is "not adequate."[111] MDC officials told us that in accordance with BOP Headquarters's instructions to maintain the tightest restrictions possible on the September 11 detainees, they decided to adopt a practice of permitting detainees one legal telephone call

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[110] For example, the BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Neither BOP Headquarters nor the MDC developed new policies addressing the unique needs of September 11 detainees regarding telephone access to allow them to obtain attorneys or place legal calls.

[111] An exception in the written policy is when the inmate or the inmate's attorney demonstrates an imminent court deadline.

per week. The MDC's legal call practice did not violate any BOP policy because, given the absence of existing written guidance from BOP Headquarters, MDC management was given broad discretion to develop and implement a facility-specific legal call policy for the detainees.

MDC unit managers and counselors controlled the process for placing legal telephone calls for detainees housed in the ADMAX SHU. Detainees who wanted to make a legal call had to submit a written request known as a "copout." A unit counselor described the process for placing legal telephone calls in the ADMAX SHU once a September 11 detainee submitted a copout:

- The counselor or unit manager plugged a telephone into an unmonitored line outside of the detainee's ADMAX SHU cell;
- The detainee provided the MDC employee with a telephone number, which the counselor or unit manager dialed and verified that the unmonitored call was placed to the detainee's attorney;
- The counselor passed the telephone to the detainee through the horizontal slot in the cell door; and
- The counselor remained at the cell door until the detainee completed his call.

In addition to the written copout process, our interview with the ADMAX SHU unit counselor and our review of the MDC Legal Call Log revealed that the unit counselor made rounds to offer legal calls to September 11 detainees, at the most, 2 to 3 times per week. In fact, our review of the Legal Call Log and copout records revealed that between September 17, 2001, and April 3, 2002, there

were six periods of over seven days in which the counselor did not make rounds in the ADMAX SHU to offer detainees the opportunity to place legal calls. Three of these periods were between September 17, 2001, and January 2, 2002, and lasted 28, 16, and 8 days. The other three periods were between January 8 and April 3, 2002, and lasted 20, 16, and 8 days.

Three September 11 detainees interviewed by the OIG said that each time the unit counselor made rounds through the ADMAX SHU he simply asked detainees "are you okay?" The three detainees said that, initially at least, they did not realize that this question was shorthand for, "Do you want a weekly legal telephone call?" A unit counselor confirmed to the OIG that when he made rounds through the ADMAX SHU to provide legal calls, he asked the September 11 detainees, "Are you okay?" to determine whether they wanted to make legal calls. Detainees we interviewed reported that an affirmative response to the question of whether they were "okay" resulted in them not receiving a legal telephone call that week.

The Associate Warden for Programs, the ADMAX SHU unit manager, and a unit counselor told us that if a detainee declined an opportunity to make a legal call, this refusal was not always recorded in the MDC's Legal Call Log. Our analysis also found that legal call refusals were not consistently annotated in the log. The Associate Warden said that the unit counselor prepared a weekly memorandum that listed the names of the detainees who refused legal calls that week.

We analyzed the weekly legal call memoranda, the Legal Call Log, and copouts for legal calls submitted by

the 19 September 11 detainees we interviewed at the MDC. The first legal call made by any September 11 detainee, according to these three sources, was not until October 15, 2001.[112] Yet, the MDC was notified via conference call by the BOP Northeast Region that legal telephone calls could be made by detainees as of September 20, 2001.

Based on the length of time spent in the ADMAX SHU, the 19 detainees we interviewed collectively should have been offered 383 opportunities to make legal phone calls. The Legal Call Log lists 200 legal calls made by these detainees.[113] We also reviewed 60 memoranda with the names of detainees who declined their legal calls and 27 copouts for which there are no corresponding entries in the log. We concluded that, at best, detainees in our sample were offered 287 legal telephone calls, far less than one legal call per detainee per week.

The detainees we interviewed also stated they were not always offered weekly legal calls. Seven of the 19 September 11 detainees we interviewed stated that they did not complete legal telephone calls and were not visited by attorneys from the time they arrived at the MDC in mid-October until mid-December 2001. When detainees

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[112] In order to assess the placement of legal calls by September 11 detainees, we requested the telephone records for the unmonitored telephone lines used by the detainees in the ADMAX SHU. The telephone company stated that it could not isolate telephone line extensions within the MDC. Additionally, MDC Warden Zenk informed us that the MDC telephone system did not have the capacity to retrieve the detainees' telephone records that we requested. Therefore, we were not able to independently verify the information in the MDC Legal Call Log or on the legal call copouts.

[113] We obtained corresponding copouts for 123 of the legal calls.

began placing legal calls from the ADMAX SHU in mid-October 2001, 15 of the 19 detainees we interviewed told the OIG they were permitted, at most, one legal telephone call per week. Three detainees told us that they never were offered legal telephone calls, and one detainee stated that he was denied legal calls as part of disciplinary punishment. A review of the Legal Call Log indicates that this particular detainee placed one legal call during the month he spent in the ADMAX SHU.

Fourteen of the 19 detainees were not offered their first legal phone calls within 7 days of arrival at the MDC. Of this group of detainees, the earliest legal phone call was offered ten days after arrival. One detainee was not offered his first legal phone call until 42 days after arrival. The average time from arrival to the first offer to make a legal phone call for the 14 detainees was 17 days.

We found that of the 287 legal telephone calls offered, 101 (37 percent) were offered more than seven days apart. In response to this finding, the MDC unit counselor said he offered weekly legal calls and the detainees' statements to the contrary were inaccurate.

Even when MDC offered detainees telephone calls, the MDC's response to unsuccessful attempts to contact attorneys by telephone was arbitrary. Four of the 19 detainees we interviewed told the OIG that legal calls resulting in a busy signal or calls answered by voicemail counted as their one legal call for the week. In addition, six detainees told the OIG that their calls to attorneys on the pro bono attorney list that resulted in no answer, were a wrong number, or resulted in a refusal to provide legal services counted as the detainees' legal call for that week. The unit counselor disputed these claims, stating that a

"no contact" or busy signal did not count against the detainee as his sole weekly legal call. The unit counselor told the OIG that if the line was busy or the call could not be placed for some other reason, he tried to provide another legal call to the detainee the next time he made rounds in the ADMAX SHU. Yet, the Legal Call Log, which lists 200 total calls for September 11 detainees, indicates at least four instances when a "no contact" or busy signal counted as a detainee's weekly legal call. Moreover, the Associate Warden for Programs, the ADMAX unit manager, and a second unit counselor acknowledged to the OIG that reaching an answering machine counted as a completed legal call, although encountering a busy signal did not. This meant that for some detainees, if they reached an answering machine while trying to obtain an attorney during their one weekly telephone call, they would not be permitted another legal call for a week.

Also, according to six September 11 detainees we interviewed, unit counselors unilaterally hung up the telephone when a detainee's legal call lasted longer than three minutes. The ADMAX SHU unit counselor denied this allegation and stated that he did not limit the length of detainees' legal calls. The Legal Call Log, which is supposed to track the length of detainee legal calls, shows most calls lasting at least 5 minutes, with the longest call noted as 34 minutes.

In late November 2001, at least 20 September 11 detainees at the MDC staged a hunger strike to express dissatisfaction with their confinement and the conditions in the ADMAX SHU, including the restrictive telephone policies. Four of the 19 September 11 detainees we

interviewed said they refused food beginning in late November 2001 to protest a lack of attorney telephone calls, among other issues. A daily ADMAX SHU report filed on November 28, 2001, confirmed the hunger strike, and noted that 20 of the September 11 detainees were refusing to eat, in part because of concerns about limited legal telephone calls.[114]

**Case Study 2:**

We interviewed a September 11 detainee at the MDC who was arrested on September 26, 2001. He said he was originally arrested after the New York JTTF executed a search warrant for his apartment. He was suspected of social security fraud, insurance fraud, and credit card fraud. He also was suspected of working with others in a scheme to provide funds to al Qaeda. He was immediately transferred to INS custody and spent approximately one day at the INS Varick Street Service Processing Center. He told us he was never informed as to why he was arrested but said he later pleaded guilty to marriage fraud.

Based on the Legal Call Log, the detainee was not offered a legal call until October 15, 2001. That call was listed as a completed 10-minute call. According to the Legal Call Log, the detainee was not offered his next legal call until November 7, 2001, which the ADMAX SHU Counselor recorded as being refused by the detainee. The log showed that on December 17, 2001, the detainee made his next legal call, the result of which was an incomplete "no answer." This

[114] We discuss detainee hunger strikes at the MDC in greater detail in Section VII of this chapter.

detainee refused three legal call offers in January 2002, according to weekly memoranda that recorded the detainees who did not wish to make a legal call.

The detainee told us that he was given a pro bono attorney list by MDC staff in October 2001. He stated that he tried to contact several legal services providers on the list, but received no responses when he called the numbers listed. He denied being offered the opportunity to make a legal phone call in November 2001. The detainee also stated that he was not allowed to make a social call to his sister for the first three months he was incarcerated at the MDC. He said that in December 2001, he finally contacted his sister and that by mid-January 2002, his sister had obtained legal representation for him, approximately four months after he entered the MDC.

**B. Attorney Visits**

The BOP's classification of September 11 detainees as WITSEC inmates also hampered their ability to visit with attorneys long after the MDC lifted its initial communications blackout. Even though MDC officials developed procedures to permit meetings between detainees and their attorneys in the ADMAX SHU, the continuing confusion on the part of MDC staff who interacted with attorneys about the location of detainees made the attorneys' ability to visit their clients more difficult.

The first attorney visit recorded for a September 11 detainee at the MDC took place on September 29, 2001. The next two attorney visits for different detainees were noted on October 10, 2001. According to the Associate Warden for Programs, the MDC did not allow September

11 detainees any visitors for about three weeks after the terrorist attacks. During this communications blackout period, MDC staff told attorneys who sought to visit September 11 detainees that information on the detainees was not available. Instead, MDC staff referred the attorneys to the BOP's National Locator Service, which, as we discussed previously, contained no information about September 11 detainees due to their WITSEC classification.

By the end of the first week in October 2001 (after the communications blackout was lifted), the MDC instituted the following new screening procedures to determine whether attorneys could meet with September 11 detainees:

- MDC staff referred an attorney seeking to visit a September 11 detainee to the Associate Warden for Programs;
- The Associate Warden called an Assistant United States Attorney to verify the credentials of the lawyer requesting to visit a detainee in the ADMAX SHU;
- The Associate Warden contacted the attorney to verify that the attorney represented a specific detainee or wanted to meet with a certain detainee to discuss representation; and
- If the attorney met the above criteria, the Associate Warden prepared a memorandum approving the attorney's visit, which she sent to staff stationed at the MDC's front desk. This approval for visitations by the Associate Warden also was ef-

fective for future visits by the attorney to the same detainee.

When an attorney seeking to visit a September 11 detainee arrived at the MDC and provided the name of his or her client, the desk officer checked two lists which were updated daily: a general, sanitized roster of all MDC inmates that did not include WITSEC/Group 155 inmates, and a list of "separatees"—inmates who had been separated from the general population for a variety of reasons. However, the Associate Warden for Programs, the MDC Captain, and MDC reception area staff told the OIG that the September 11 detainees were not on either list. Instead, their names were kept on a third list maintained elsewhere in the MDC in order to control access to the information. This list was not kept at the MDC reception area. Therefore, if an attorney asked about a detainee whose name was not on either of the two daily lists available to the officer at the front desk, and the attorney had not obtained prior approval for visits from the Associate Warden, the desk officer told the attorney that the detainee was not present at the facility (when, in fact, the detainee may have been incarcerated in the ADMAX SHU).

Five New York-area attorneys told us that they were unable to meet with their September 11 detainee clients for many weeks because MDC staff told them that their clients were not housed at the MDC. Four of the attorneys each represented one detainee and one attorney represented several MDC detainees. According to the attorneys, they were not permitted to visit their clients during the second week of November 2001, and the first weeks of December 2001, February 2002, and March

2002. The attorneys said they were turned away either over the telephone or when they showed up at the MDC. According to the attorneys, no MDC officials mentioned any clearance procedure they needed to follow in order to visit their clients.

Eventually, these attorneys did gain access to their clients, and by the time of our May 2002 site visit to the MDC, all of the attorneys we interviewed said they were not having problems obtaining access to their clients at the MDC.

### C. Pro Bono Attorney List

As noted above, most of the September 11 detainees had not hired attorneys before entering the MDC and, consequently, needed to solicit legal representation when initially incarcerated in the MDC. For example, 17 of the 19 September 11 detainees we interviewed said they did not have attorneys when they arrived at the MDC. The remaining two detainees had retained attorneys during their stays at other detention facilities before they were transferred to the MDC.

We found that the INS did not consistently provide September 11 detainees with lists of attorneys who would take immigration clients without compensation (known as "pro bono" cases). Several of the detainees we interviewed said that they did not receive the pro bono lists until days or months after their arrival at the MDC.[115]

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[115] Eleven of the 19 September 11 detainees we interviewed said they received pro bono attorney lists from ADMAX SHU counselors within the first month of entering the MDC. However, four detainees stated that they did not receive the list for more than a month, and one detainee stated that he never received a pro bono attorney

We also found that the lists they eventually received contained significant inaccuracies, including wrong telephone numbers and numbers for attorneys who were unwilling or unable to take the September 11 detainees as clients because they only handled immigration asylum claims.

As stated previously, the BOP classified the September 11 detainees as pre-trial inmates. The BOP has no policy that requires its staff to provide lists of pro bono attorneys to pre-trial inmates arrested by the INS. On the other hand, federal regulations specify that INS officers who processed the September 11 detainees after they were arrested were responsible for providing the detainees "with a list of the available free legal services . . . located in the [INS] district."[116] The Executive Office for Immigration Review (EOIR), part of the Department of Justice, maintains lists of pro bono attorneys who offer free legal services to immigration detainees in each INS District and distributes these lists to detention facilities holding immigration detainees.

In addition, Immigration Judges overseeing removal proceedings for the September 11 detainees also are required to, "[a]dvise [detainees] of the availability of free legal services . . . located in the [INS] district."[117] The INS requires that staff members at all of its detention facilities, including contract facilities, enable detain-

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list. Two September 11 detainees we interviewed were unsure when they received the list, and one detainee's attorney advised him not to respond to our question.

[116] 8 C.F.R. § 287.3(c).

[117] 8 C.F.R. § 240.10(a)(2).

ees to make calls to attorneys on the INS-provided pro bono list.

According to the MDC's Associate Warden for Programs and the ADMAX SHU Captain, when the BOP lifted its restriction on telephone calls for September 11 detainees on October 1, 2001, MDC staff obtained a list of pro bono attorneys from the INS within a week and provided that list to detainees. However, the MDC staff we interviewed, including the Associate Warden, stated that the list contained inaccurate telephone numbers.

As described above, some detainees told us that their calls to attorneys on the pro bono list that resulted in no answer, were clearly an inaccurate number, or resulted in a refusal to provide legal services counted as the detainees' legal calls for that week. Consequently, the inaccurate pro bono attorney list affected detainees' ability to contact counsel in a timely manner. The Associate Warden and the ADMAX SHU Captain told the OIG that they obtained more accurate pro bono lists from EOIR and the INS between mid-October and early November 2001.

### D. Social Visits

We found that BOP's classification of September 11 detainees as WITSEC/Group 155 inmates, and the resulting confusion this designation caused MDC staff, prevented or delayed many of the detainees' visits from family members.

In order to schedule a social (as opposed to an attorney) visit, September 11 detainees had to provide a list to MDC staff of which family members they wanted to be able to visit them. The same problems that attorneys encountered in attempting to visit their clients at the

MDC hindered the detainees' family visits as well. Three detainees we interviewed said family members on their lists were told by MDC staff that the detainees were not housed at the MDC when, in fact, the detainees were in the facility.

As discussed previously, the BOP made changes in the detainees' classification status at the end of October 2001 after realizing that its original WITSEC/Group 155 designations were causing problems for MDC staff in handling requests for visits from detainees' attorneys and family members. The BOP also added notations in its SENTRY inmate tracking system whenever a September 11 detainee's name was queried before staff authorized a visit. The messages were designed to alert MDC staff about information that could and could not be released about these detainees (e.g., "Special SIS case—do not disclose location—notify SIS of inquiry"). We found, however, that the detainees' redesignation in the BOP system did not mean that MDC staff provided better assistance to detainees' visitors. The MDC's Associate Warden for Programs told the OIG that MDC management sought to address the social visitation problem by training reception area staff on proper procedures for granting visitation to detainee family members. However, problems persisted, as illustrated by the following case study.

**Case Study 3:**

One September 11 detainee was held at the MDC from October 16, 2001, until June 14, 2002. His wife said she experienced repeated problems while attempting to visit her husband. The woman, who took unpaid leave from work to travel from her home in New Jersey to

the MDC, said that between October and December 2001 she was told by staff at the MDC visitors' desk that her husband was not incarcerated at the facility when, in fact, he was. When she eventually learned her husband was at the MDC, she visited him for the first time on December 19, 2001, after being granted a "special visit" by the unit manager at a date and time outside the normal visiting schedule. From January 31 to March 31, 2002, the woman said she was not permitted to visit her husband because he was being disciplined for failing to stand up for a 4:00 p.m. daily count.

The woman subsequently was permitted to visit her husband during the week of April 2, 2002. However, she was not permitted to visit her husband the week of May 1, 2002, because she arrived at the MDC on a day and at a time that MDC reception area staff told her was not the appropriate time to visit detainees held in the ADMAX SHU. The woman told the OIG that she assumed this was an appropriate time because it was the same day of the week and hour of her previous "special visit." When she contacted the ADMAX SHU unit manager about this particular visitation problem, he arranged for another "special visit" which took place on May 4, 2002. On May 9, 2002, the detainee's wife arrived at the MDC to visit her husband but MDC staff told her that all the visitation rooms were full. She was asked to wait until after the 4:00 p.m. inmate count for a possible visit at 4:30 p.m. At 4:30 p.m., the reception staff told her to go home and call the following day. On May 10, 2002, the detainee's wife said she was unsuccessful in contacting anyone at the MDC to arrange a

visit with her husband.

As of May 10, 2002, the woman had succeeded in visiting her husband three times during his more than five months of confinement in the ADMAX SHU.

### E. Contact with Foreign Consulates

Similar to the problems experienced by attorneys seeking access to their September 11 detainee clients, the BOP's categorization of these detainees as WITSEC inmates inhibited the ability of consular officials to determine whether individuals from their countries were held at the MDC. Beyond that issue, however, we found that MDC staff did attempt to facilitate visits by foreign consulates that requested meetings with detainees from their countries.

The federal government's policy regarding consular access to incarcerated foreign nationals applies whether the detainees are in the custody of the BOP or the INS. Federal regulations state:

> Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries . . . require immediate communication with appropriate consular or diplomatic officers whenever nationals . . . are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf.[118]

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[118] 8 C.F.R. § 236.1(e).

According to Michael Rozos, Chief of the INS's Long Term Review Branch, INS agents who arrested September 11 detainees on immigration violations were required to inform the aliens that they had a right to contact consular or diplomatic officers from their country of nationality in the United States. Rozos acknowledged that if aliens express an interest in making such contacts, the INS is required to facilitate that request, usually by providing the detainee access to a telephone along with the number for the appropriate consulate.

INS regulations specifically provide that an alien detained by the INS "shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." Therefore, the INS was responsible for informing the September 11 detainees of their rights to contact their consular representatives, even for those detainees who were first held at BOP facilities like the MDC. The INS uses a form to document that it asked detained aliens if they wanted to contact their consulate.[119] Of the 44 A-Files we were able to review for the September 11 detainees in our MDC sample, only 10 detainees had copies of this form in their files.

BOP policy requires that "whenever it is determined that an inmate is a citizen of a foreign country, the Warden shall permit the consular representative of the country to visit on matters of legitimate business. A Warden may not deny this privilege even if the inmate is in disci-

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[119] INS Form I-213, "Notice to Arrested or Detained Foreign Nationals Consular Notification and Access."

plinary status."[120] MDC Warden Zenk said that the MDC's role was limited to providing detainees with consular telephone calls upon their request and to facilitate detainees' meetings with consular officials after MDC staff conducted appropriate screenings of the consular officials. He said that the MDC did not have responsibility for notifying detainees' consulates about their incarcerations.

Zenk told the OIG that the MDC was not contacted by any foreign consulates about September 11 detainees in the two weeks immediately following the September 11 attacks. Zenk and the Associate Warden for Programs said that beginning in October 2001, all inquiries from consulates to the MDC were directed to the Warden's Executive Assistant, who served as the point of contact for consular representatives seeking to visit September 11 detainees at the MDC. According to Zenk, the MDC carefully screened consular personnel before permitting them to visit with September 11 detainees. He said consulates were required to submit a written request stating the name of the detainee to be visited and the names of the visiting consular officials. When the visitors were approved, the Executive Assistant or the Associate Warden for Programs forwarded a memorandum officially approving the visits to the MDC's front desk to inform MDC staff of the impending consular visit.

However, similar to the difficulty experienced by detainees' attorneys and family members seeking to meet with them, the MDC detainees' designation as WITSEC inmates made it difficult for consulates to contact de-

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[120] BOP Program Statement 5267.06, Visiting Regulations.

tainees who were citizens of their countries. For example, on October 9, 2001, a consular official met with five September 11 detainees at the MDC. Later that same day, the consular official tried to call the MDC Warden to discuss the detainees' cases, but was informed by an MDC employee that none of the five detainees was held at the MDC. Instead, the MDC employee gave the consular official the telephone number for BOP's National Inmate Locator, which, as discussed previously, did not contain information about the September 11 detainees.

Our review of files maintained by the Warden's Executive Assistant shows that between October 1, 2001, and May 7, 2002, the MDC received 22 requests for visits from 9 consulates regarding 24 different detainees. In addition, the Pakistani consulate made two requests to meet all Pakistani detainees housed at the MDC. Most of the correspondence in the file is annotated to indicate that a consular visit was approved or actually occurred. The exceptions were an October 24, 2001, request to visit five detainees, and a December 6, 2001, letter requesting visits with two detainees. We were unable to determine whether these consular visits took place because the letters are not annotated and the MDC did not maintain a separate list that reflected consular visits with September 11 detainees.

The MDC was not required to affirmatively notify foreign consulates that it was detaining citizens from their countries who had been arrested in connection with the September 11 terrorism investigation. BOP policy mandated only that MDC officials "permit" visits by consular officials. The overwhelming majority of September 11 detainees were nationals of Pakistan, India, Egypt, and

Saudi Arabia. The international treaties that the United States has with these countries do not require mandatory notification of the consulate when a foreign national of those countries is held in U.S. detention.

Our review of the 22 visitation requests from consulates received by the MDC from October 2001 to early May 2002 showed that only 2 of the requests were from a country (United Kingdom) that, by treaty, requires affirmative notification. While we did not determine if the INS affirmatively notified United Kingdom consular officials of these two detentions, we found that these two detainees were visited by consular officials from the United Kingdom and the MDC complied with BOP policies in facilitating consular visits for these two detainees.

## VI. ALLEGATIONS OF PHYSICAL AND VERBAL ABUSE

Based on our interviews of 19 September 11 detainees and our investigation of allegations of abuse raised by several detainees, we believe the evidence indicates a pattern of physical and verbal abuse against some September 11 detainees held at the MDC by some correctional officers, particularly during the first months after the terrorist attacks. Although the allegations have been declined for criminal prosecution, the OIG is continuing to investigate these matters administratively.[121]

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[121] The OIG can pursue a complaint either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, for a variety of reasons, may not result in prosecution. When this occurs, the OIG can continue the investigation and treat the matter as a case for potential administrative action. The stand-

In this section of the report, we describe our interviews of 19 September 11 detainees during our inspection visit in May 2002, the investigation conducted by the OIG's Investigations Division regarding specific complaints of abuse, and other allegations of abuse that were referred to the FBI or BOP for investigation.

### A. OIG Site Visit

In connection with this review of the treatment of September 11 detainees, our inspection team interviewed 19 detainees who were being held at the MDC when we visited the facility in May 2002. All 19 detainees complained of some form of abuse. Twelve complained about physical abuse and 10 complained about verbal abuse. The complaints of physical abuse ranged from painfully tight handcuffs to allegations they were slammed against the wall by MDC staff. The detainees told us that the physical abuse usually occurred upon their arrival at the MDC, while being moved to and from their cells, or when the hand-held surveillance camera was turned off.

Ten of the 19 detainees we interviewed during our inspection visit alleged they had been subjected to verbal abuse by MDC staff, consisting of slurs and threats. According to detainees, the verbal abuse included taunts such as "Bin Laden Junior" or threats such as "you're going to die here," "you're never going to get out of here," and "you will be here for 20-25 years like the Cuban people." They said most of the verbal abuse occurred during intake and during movement to and from the detainees' cells.

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ard of proof to prove allegations in an administrative case is less than the "beyond a reasonable doubt" standard in a criminal case.

Our inspection team interviewed 12 correctional officers about the detainees' allegations of physical abuse. All 12 officers denied witnessing or committing any acts of abuse. Further, they denied knowledge of any rumors about allegations of abuse. The correctional officers we interviewed also denied they verbally abused the detainees and denied making these specific comments to the detainees.

### B. OIG Investigation of Abuse

On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter. When we interviewed the detainee, he complained that MDC officers repeatedly slammed him against walls while twisting his arm behind his back. He also alleged officers dragged him by his handcuffed arms and frequently stepped on the chain between his ankle cuffs. The detainee stated his ankles and wrists were injured as a result of the officers' abuse. He also identified three other September 11 detainees who allegedly had been abused by MDC staff members.

We interviewed these three other September 11 detainees. They stated that when they arrived at the MDC, they were forcefully pulled out of the vehicle and slammed against walls. One detainee further alleged that his handcuffs were painfully tight around his wrists and that MDC officers repeatedly stepped on the chain between his ankle cuffs. Another detainee alleged officers dragged him by his handcuffs and twisted his wrist every time they moved him. All three detainees alleged that officers ver-

bally abused them with racial slurs and threats like "you will feel pain" and "someone thinks you have something to do with the World Trade Center so don't expect to be treated well."

During our investigation of these complaints, we received similar allegations from other September 11 detainees. On February 11, 2002, four September 11 detainees held at the MDC (including one of the detainees we interviewed previously) told MDC officers that certain MDC officers were physically and verbally abusing them. Those complaints were provided to us. In interviews with our investigators, these detainees alleged that when they arrived at the MDC in September and October 2001, MDC officers forcefully pulled them from the car, slammed them into walls, dragged them by their arms, stepped on the chain between their ankle cuffs, verbally abused them, and twisted their arms, hands, wrists, and fingers. One of the detainees alleged that when he was being taken to the MDC's medical department following a 4-day hunger strike, an officer bent his finger back until it touched his wrist. Another detainee alleged that when he arrived at the MDC, officers repeatedly twisted his arm, which was in a cast, and finger, which was healing from a recent operation. He also alleged that when he was transferred to another cell in December 2001, officers slammed him into a wall and twisted his wrist.[122] One

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[122] This detainee alleged that while being transferred to another cell in the MDC in December 2001, two officers threw him against his cell wall, twisted his wrist, and placed him in the cell naked and without a blanket. The detainee claimed the officers physically abused him because he refused to clean his cell prior to the transfer. He claimed the officers' abuse left a scar on his wrist. The case was referred to the BOP, which interviewed the detainee, reviewed his

detainee claimed his chin was cut open and he had to receive stitches because officers slammed him against a wall.

During our investigation, the OIG asked the detainees individually to identify the officers who had committed the abuse through photographic lineups. The detainees identified many of the same officers as the perpetrators, and the OIG focused its investigation on eight officers. The OIG interviewed seven of these officers. Six of them denied physically or verbally abusing any of the detainees or witnessing any other officer abuse the detainees. Five remembered at least one of the detainees and some of them remembered a few of the detainees. Two officers described two detainees as disruptive and uncooperative. One of the officers explained that the high-security procedures in place during the weeks following the September 11 attacks required four officers to physically control inmates during all escorts; face them toward the wall while waiting for doors, elevators, or the application and removal of leg restraints; and place them against the wall if they became aggressive during these escorts.

The seventh officer interviewed by the OIG told us that he witnessed officers "slam" inmates against walls and

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medical records, and had the detainee's wrist examined. The MDC medical department did not find a scar on the detainee's wrist. The BOP also interviewed two officers alleged to have committed the abuse and a supervising officer who witnessed the detainee's transfer. All three stated that during a routine cell rotation the detainee began cursing and threatening the officers. One officer filed an incident report describing what he characterized as the detainee's insolent and threatening behavior. The three officers also stated that they did not throw the detainee against the wall, twist his wrist, or place him in a cell naked and without a blanket.

stated this was a common practice before the MDC began videotaping the detainees. He said he did not believe these actions were warranted. He said he told MDC officers to "ease up" and not to be so aggressive when escorting detainees. He also said he witnessed a supervising officer slam detainees against walls, but when he spoke with the officer about this practice the officer told him it was all part of being in jail and not to worry about it. The seventh officer signed a sworn affidavit to this effect. In a subsequent interview with the OIG, this officer recharacterized the action as "placing" the detainees against the wall, and said he did not want to use the word "slam." He denied that the officers acted in an abusive or inappropriate manner.

The OIG reviewed the detainees' medical records. The medical records do not indicate that most of the detainees received medical treatment for the injuries they asserted they received from officers. Two of the detainees' medical records indicate they were treated for injuries that they later claimed were caused by officers, but the medical records did not indicate that they alleged their injuries were caused by officers at the time they were treated. One detainee's records do not mention the cause of the injury and the other detainee's records state the detainee said he was injured when he fell. In his interview with the OIG, the detainee alleged his chin was badly cut when detention officers slammed him against the wall. He said that nobody ever asked him how his injury occurred. The other five detainees did not seek treatment for their alleged injuries.

Based on the scarcity of medical records documenting injuries and the lack of evidence of serious injuries to

most of the detainees, the U.S. Attorney's Office for the Eastern District of New York and the Civil Rights Division declined criminal prosecution in this case. All of the detainees, with the exception of one, now have been removed from the United States. Nevertheless, the OIG is continuing its investigation of these allegations as an administrative matter. Because this case is ongoing, we are not describing in detail all the evidence in the case about the detainees' allegations. However, we believe there is evidence supporting the detainees' claims of abuse, including the fact that similar—although not identical—allegations of abuse have been raised by other detainees, which we describe in the next section.

### C. FBI and BOP Investigations of Abuse

Four cases alleging physical abuse of September 11 detainees at the MDC were referred to the FBI for investigation. Another two complaints of abuse were referred to the BOP's internal affairs office for review. As we summarize below, the FBI closed three of these cases and one FBI case remains open. The BOP closed one case due to the resignation of an employee and closed the other as unsubstantiated after conducting an investigation.

In each of the four cases assigned to the FBI, the detainee alleged that he was "slammed" against a wall or door by MDC correctional officers and was injured as a result. Two of the detainees also alleged that they were threatened by MDC correctional officers and incurred additional physical abuse, such as being kicked by officers or having the chain on their leg restraints stepped on by officers. The detainees' complaints were forwarded initially to the Department's Civil Rights Division, which

after a delay in two of the cases assigned them to the FBI to investigate. In two of the cases sent to the FBI, the detainees already had been removed by the time the FBI received the complaints and were not interviewed. In another case, the detainee was removed six months after the FBI received the case, but was not interviewed. The FBI did not attempt to locate these removed detainees or to interview the correctional officers. The Civil Rights Division declined prosecution of the three cases, and the FBI subsequently closed its investigations.

In the one case that the FBI has not yet closed, the detainee complained in May 2002 that he was slammed into a wall, unnecessarily strip searched, and physically abused by MDC officers. The FBI received the case in July 2002, and opened an investigation in September 2002. As of March 19, 2003, however, the FBI had not interviewed the detainee or any officers.

In one of the cases referred to the BOP, the correctional officer who allegedly physically and verbally abused the detainee resigned during the investigation, and as a result the BOP closed the matter without further investigation. In the other case, the BOP interviewed the detainee, reviewed his medical records, and had his alleged injuries medically examined. The medical department did not find any injuries and the detainee's medical records do not indicate any injuries around the time of the alleged abuse. The BOP also interviewed two subjects and a supervising officer who witnessed the detainee's transfer. All three officers denied abusing the detainee and stated that during a routine cell rotation, the detainee began cursing and threatening the subjects. The BOP closed its investigation as unsubstantiated.

Based on the similarity of the allegations in these FBI and BOP cases to the ongoing OIG investigation, the OIG has decided to complete the investigations of the FBI and BOP cases and incorporate the relevant allegations from these cases into our ongoing investigation.

### D. Allegations of Harassment

All 19 detainees we interviewed also complained of other types of harassing behavior by MDC staff while they were housed in the ADMAX SHU, such as staff banging on their cell doors or telling detainees to "shut up" while they were praying. All 19 detainees told the OIG that MDC officers banged on their cell doors for the midnight inmate count. When we questioned MDC staff about these allegations, they told us that they were responsible for ensuring that the detainees were alive during the nightly count and that banging on the cell doors was their method of waking the detainees. We confirmed that, according to BOP Program Statement 5511.06, Inmate Accountability, "Staff conducting counts shall ensure the observance of a real person and not a 'dummy.' When conducting a count, the staff member must personally observe a living breathing human body for each inmate counted." MDC staff told us they banged on the cell door to satisfy the BOP's national policy requirement to ensure that a living human body was in each ADMAX SHU cell.[123]

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[123] BOP national policy requires inmate stand-up counts at least five times per day but specifies times for only two of the counts—4:00 p.m. daily and 10 a.m. on weekends and holidays. The BOP's practice is to conduct at least one of the other counts sometime during the hours of darkness.

September 11 detainees also told the OIG that their afternoon prayers often were interrupted by MDC officers who conducted a "stand-up count" at 4:00 p.m. daily in the ADMAX SHU. MDC officials said the detainees were informed about these daily counts, including the midnight count, in a 2-page document containing ADMAX SHU policies that each detainee was supposed to receive when he first entered the MDC. However, several detainees told the OIG that they did not sufficiently understand English or they did not realize they were supposed to stop praying for the count. Two September 11 detainees said they were disciplined for not standing up during the count by being deprived of social visits. According to MDC records, one detainee had his social visitation privileges suspended for 60 days, while another detainee had his privileges suspended for 90 days.

When we questioned MDC staff on this subject, one Lieutenant said he delayed the afternoon count until the detainees had completed their prayers. All the other Lieutenants and correctional officers we interviewed said they followed standard BOP regulations and did not delay the afternoon count to avoid interfering with detainees' prayers.

### E. Reporting Allegations of Abuse

Even though the MDC has a formal process for inmates to file complaints of abuse, we found that MDC staff failed to inform the September 11 detainees about these procedures in a timely manner. As discussed previously, the Administrative Remedy Program (ARP) is the BOP's formal procedure for filing allegations of physical or verbal abuse against facility staff. While the ARP is discussed in the MDC's facility handbook, only 1

of the 19 detainees we interviewed said he received this handbook when he arrived at the MDC in October 2001. The other 18 detainees we interviewed told us that they did not learn about this complaint resolution process until they received their facility handbooks several months after their arrival at the MDC.[124]

Of the 19 detainees we interviewed, 5 who said they never received facility handbooks told the OIG that they only learned about the ARP from other detainees in the ADMAX SHU. Ten detainees said they received a handbook four to six months after arriving at the MDC, while three other detainees said they received a handbook within a month of arriving at the MDC.[125] One detainee did not respond to the question about when he received a facility handbook.

All 19 detainees told the OIG that they either were informed verbally about ADMAX SHU policies or they received a 2-page explanation of the policies instead of the complete MDC facility handbook. We found, however, that this 2-page summary of MDC policies did not include a description of the ARP process.

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[124] During intake screening at BOP facilities, a facility handbook normally is provided to the inmate and prison staff annotates the inmate's intake form to reflect that the inmate has received the handbook. When we examined the intake forms for the 19 September 11 detainees we interviewed, all forms were annotated to reflect that each detainee had received a handbook, which suggested that the handbook was given to the inmate but was quickly confiscated because it was on the list of forbidden items.

[125] One of these three detainees said he did not receive a handbook until he was released into the MDC's general population in May 2002.

The Associate Warden for Programs told the OIG that all September 11 detainees were provided with a handbook when they were processed into the MDC. She suggested that it was possible that correctional officers confiscated the handbook from the detainees as an unacceptable item in their ADMAX SHU cell. The two-page document, "Special Housing Unit Rules and Regulations," included a list of items that the detainees could retain in their ADMAX SHU cells. These items included certain clothing items, facility-provided linen, specified personal items, and select hygiene items. The list of permitted items did not include a facility handbook. Therefore, according to the Associate Warden for Programs, because the facility handbook was not on the list, correctional officers may have confiscated the handbook. On October 17, 2001, the MDC changed its policy to permit detainees to retain the facility handbook in their cells. MDC officials could not explain why the detainees said that they did not receive the facility handbooks until months later. The Associate Warden also stated that some detainees might not have become familiar with the ARP process until several months after they arrived at the MDC because they did not understand English or had not read the handbook.

### F. MDC Videotapes

MDC management took some affirmative steps to prevent potential staff abuse by installing security cameras in each September 11 detainee's cell in the ADMAX SHU and by requiring MDC staff to videotape all movements of detainees to and from their cells. However, the MDC's policy that permitted staff to destroy or reuse these videotapes after 30 days hindered these efforts. As a re-

sult, the OIG, MDC management, and others were unable to use the videotapes to prove or disprove allegations of abuse raised by individual detainees.

According to interviews with BOP staff, the MDC installed cameras in its ADMAX SHU cells by mid-October 2001 pursuant to a national directive issued shortly after the September 11 attacks.[126] The directive required that cameras be installed in each cell housing a September 11 detainee. According to BOP and MDC officials, the security cameras were installed because the video record could help protect BOP staff from unfounded allegations of abuse. According to an "al Qaeda Training Manual" found by police in Manchester, England, during a search of an al Qaeda member's home, terrorists incarcerated in the United States were urged to distract Government officials by claiming mistreatment. Consequently, the BOP was concerned that specious allegations of abuse would consume valuable administrative and legal resources.

David Rardin, the former BOP Northeast Region Director, directed in an October 9, 2001, memorandum to Northeast Region Wardens (including the MDC) that any movement of a September 11 detainee outside of his cell must be videotaped. According to Rardin's memorandum, the videotape policy was intended to deter unfounded allegations of abuse made by September 11 detainees and to substantiate abuse if it occurred.

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[126] This policy was communicated by BOP Assistant Director Michael Cooksey to all BOP Regional Directors in a series of video conference calls that occurred between September 13 and September 20, 2001.

Rardin also directed that these videotapes of detainee movements and tapes of detainees in their cells were to be preserved "indefinitely." However, by December 18, 2001, after the MDC had accumulated hundreds of videotapes, Mickey Ray, Rardin's successor as the BOP's Northeast Region Director, revised the policy for retaining surveillance videotapes from "indefinitely" to 30 days, except for incidents involving use of force by BOP staff. According to instructions from Ray, tapes that showed use of force by MDC staff against detainees were to be preserved for "evidentiary use." Tapes that did not show use of force against detainees could be reused on the 31st day. Acting on Ray's new policy, MDC Warden Zenk and the MDC Captain told the OIG that correctional staff destroyed hundreds of tapes to free up storage space at the MDC.

Consequently, videotapes that could have helped prove or disprove allegations of abuse raised by detainees were not available. The lack of videotape evidence hampered the OIG's investigation of detainee abuse complaints.

## VII. OTHER ISSUES

### A. Medical Care

We were unable to assess fully the level or quality of medical care provided to the September 11 detainees based on the limited documentation in the detainees' medical files.[127] Four September 11 detainees we interview-

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[127] An MDC physician's assistant interviewed by the OIG in May 2002 initially said that September 11 detainees were not entitled to the same medical or dental care as convicted federal inmates. However, in a January 2003 follow-up interview, the physician's assistant denied making those statements to the OIG, and instead asserted

ed complained that MDC medical staff provided them with over-the-counter pain relievers for every medical problem they raised, including toothaches and pain from kidney stones. The detainees alleged that they were not offered more effective treatments for their medical conditions.

One detainee told the OIG that he was given Tylenol for a sore throat but was given nothing for an elevated temperature associated with the flu. Another detainee, who fractured his hand prior to arriving at the MDC and had his cast removed the day before he arrived, claimed he received no treatment after informing MDC medical staff that he was in pain. When the detainee's hand was x-rayed in January 2002, the MDC physician's assistant allegedly told him that while the x-ray showed cracks in his hand, "we are not going to do anything about it." His MDC medical record showed that an x-ray was taken but the accompanying notes in the file were illegible. When questioned by the OIG, the physician's assistant said she did not recall making that statement to the detainee.

When we asked the same physician's assistant whether Tylenol was the only pain relief medication offered to the detainees, she responded that the MDC's normal practice wa to provide medications that are sufficient to relieve pain and discomfort. We interpreted this statement to mean that from the physician assistant's per-

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that pretrial inmates are entitled to the same health care as any other inmates in BOP custody. According to BOP Program Statement 7331.03 on Pretrial Inmates, "staff shall provide the pretrial inmate with the same level of basic medical (including dental), psychiatric, and psychological care provided to convicted inmates."

spective, Tylenol was sufficient to treat most discomfort. The physician's assistant said she dispensed Tylenol to the detainee who claimed he was not treated for his hand discomfort.

In keeping with the high-security procedures implemented by the MDC for moving September 11 detainees housed in the ADMAX SHU, a detainee's visit to the MDC medical or dental offices required removal of all other non-ADMAX SHU inmates from the offices before medical or dental staff could conduct diagnostic procedures such as x-rays. The MDC's escort requirement for September 11 detainees was unique among MDC inmates and, according to the physician's assistant, resulted in delayed medical or dental care for the detainees. For example, the physician's assistant told the OIG about a 4-week delay in x-raying a detainee because of the manpower-intensive escort requirement. However, she speculated that other reasons also might have delayed a detainee's diagnostic procedure, including an unexpected attorney visit. The physician's assistant could not recall how many detainees were affected by such delays for diagnostic services, except that the number was small.

Interviews with September 11 detainees and MDC records confirmed that medical staff made daily rounds in the ADMAX SHU. Beyond that, however, incomplete documentation in the facility's medical files made it impossible for us to draw conclusions about the quality of medical and dental care provided by MDC staff to September 11 detainees.

### B. Recreation

MDC staff provided the limited amount of recreation for September 11 detainees required by BOP policy for

high-security inmates. However, the large number of detainees housed in the ADMAX SHU, the lack of warm clothing, and scheduling conflicts restricted the detainees' willingness or ability to participate in exercise.

According to BOP policy, ADMAX SHU detainees are entitled to one hour of recreation a day, five days a week. MDC staff documented the ADMAX SHU record each time they offered recreation to September 11 detainees and also noted any refusals by a detainee to participate in recreation.

September 11 detainees told the OIG that lack of proper clothing was a major reason why they often refused recreation. According to all 19 detainees we interviewed, during November and December 2001 the short-sleeved shirts they were provided offered insufficient protection from the cold in the recreation areas in the ADMAX SHU, which were located on the top floor of the MDC and were open-air.

Three detainees told the OIG that in January 2002, MDC staff began offering jackets to detainees who wanted to exercise. According to 18 ADMAX SHU reports we reviewed covering a period from November 9, 2001, to January 8, 2002, almost 75 percent of the detainees held at any one time in the ADMAX SHU declined recreation because it was regularly offered in the early morning when conditions were too cold.

### C. Lighting in the ADMAX SHU

Eighteen of the 19 detainees we interviewed told the OIG that lights in their cells were illuminated at all times, even at night. MDC management told the OIG that these lights were necessary to properly operate the secu-

rity cameras installed in each of the detainees' cells. In addition, MDC management claimed that it did not have the ability to reduce the amount of light in the detainees' cells due to the manner in which the cellblock's wiring was configured. However, we found that MDC staff was able to reduce the amount of light in individual detainee cells as early as November 2001, but chose to keep the cell lights on 24 hours a day until at least late February 2002.

In mid-October 2001, the MDC installed security cameras in each ADMAX SHU cell. According to Warden Zenk, each cell had to be illuminated sufficiently to provide for effective operation of the cameras. Each ADMAX SHU cell at the MDC has two lights: a small, square "nightlight" immediately inside the cell entrance, and a larger, rectangular "main light" in an upper corner of the cell. The nightlight, which is flush with the cell wall, is significantly dimmer than the cell's larger main light. A single switch located in a secure area at the end of the range controlled the two lights in all ADMAX SHU cells. While BOP policy provides that ADMAX SHU cells should be "adequately lighted," it does not specify the magnitude of lighting or hours of the day when lights should be turned on or off.

Eleven of the 19 detainees we interviewed said both lights in their ADMAX SHU cells were illuminated 24 hours a day until late March or early April 2002. Two detainees told the OIG that the main light in their cells was turned off in the evenings beginning in late February 2002. The other six detainees we spoke with could not specify the date the main cell lights were first turned off at night. A Lieutenant assigned to the ADMAX SHU

during this period told the OIG that while he was unsure of the date, he remembered that detainees in the ADMAX SHU cells cheered when the main lights were first turned off in the evening.

All 19 detainees we interviewed complained about the difficulty of sleeping with both lights illuminated at all times in their ADMAX SHU cells. Detainees who were transferred to MDC's general population—which did not follow the same cell lighting protocols as the ADMAX SHU—told the OIG they were relieved to have the cell lights turned off during the evenings. The detainees told the OIG that the constant lighting in their ADMAX SHU cells affected them in the following ways: lack of sleep, exhaustion, depression, stress, acute weight loss, fevers, panic attacks, rapid heart beat, and reduced eyesight. In addition, according to a November 27, 2001, ADMAX SHU report, a September 11 detainee at the MDC whom we did not interview requested to see the MDC psychologist because he claimed he was suffering from sleep deprivation "after several months with the cell lights continuously illuminated."

When questioned about the issue, Warden Zenk and other MDC managers told the OIG that both lights in each detainee's ADMAX SHU cell were illuminated 24 hours a day until mid-March 2002. They said that at that time, installation of a new electrical circuit permitted staff to independently operate the two lights in the cells housing September 11 detainees. MDC staff said that after mid-March 2002 the main lights in detainees' cells were turned off from 11:00 p.m. until 6:00 a.m. on weekdays, and from 11:00 p.m. until 10:00 a.m. on weekends. They said that after mid-March 2002, only the smaller nightlight in each detainee's cell was illuminated 24 hours

a day, and this was done to facilitate operation of the security cameras.

However, we found a wide discrepancy among MDC staff and other BOP officials as to the date the ADMAX SHU cells were rewired to permit independent operation of the nightlight and the main light. Our interviews with MDC and BOP staff found:

- The MDC facilities manager stated that the two sets of cell lights were rewired in late September or early October 2001, which allowed the main lights in the ADMAX SHU cells to be turned off independently from the nightlights;
- The MDC Associate Warden for Operations estimated that the lights were rewired between January and February 2002;[128]
- The MDC electrician who performed the work said he rewired the circuits for the lights sometime in October or November 2001. While uncertain of the exact date, he told the OIG that he was positive the date was in this 2-month range; and
- The BOP's Northeast Region detailed an employee to the MDC to assist with rewiring the lights in the ADMAX SHU cells and installing the security cameras. A Facilities Management Specialist from the Northeast Region Office told the OIG that he was detailed to the MDC from November

[128] A written work order was not used to authorize rewiring the switch that controls the lights in the ADMAX SHU cells. According to MDC management, the work order was conveyed verbally by the Associate Warden of Operations.

> 5-9, 2001, and assisted the MDC electrician in re-routing the lighting circuits in the ADMAX SHU cells so the two cell lights could be operated independently.

The MDC electrician stated that after detainees complained about both lights still being illuminated 24 hours a day, he checked the lights in January or February 2002 and found the rewiring he had performed in October or November 2001 was operating so that the larger main light in the cells could have been turned off separately from the smaller nightlight.

Warden Zenk responded to the OIG's findings that the main lights could have been turned off by the fall of 2001 by stating that MDC staff completed rewiring lights in the ADMAX SHU cells "by December 1, 2001." He said that at that point, the circuits for the lights were reconfigured for only two selections: either the nightlight could be turned on or the main light could be turned on, but not both lights simultaneously.

Warden Zenk further explained that while MDC management had originally told us that the two lights in the ADMAX SHU cells were illuminated 24 hours per day until "mid-March 2002," this date represented the time by which all SHU cells, including the second non-ADMAX SHU range that did not house September 11 detainees, were rewired to permit independent operation of the two lights. However, his response does not explain why 13 of the 19 September 11 detainees we interviewed stated that both lights in their cells were illuminated 24 hours a day until at least late February 2002.

We concluded that MDC staff had the capability to independently operate the lights in the detainees' AD-

MAX SHU cells by November 2001. We based our conclusion on interviews with September 11 detainees housed in the ADMAX SHU, BOP personnel from the Northeast Region Office, and staff at the MDC who either performed the rewiring or exercised direct oversight over the electrical work. While MDC management claimed that the facility did not have the ability to separately operate lights in detainees' ADMAX SHU cells until December 2001, the earliest date in which detainees said the main lights were turned off at night was late February 2002. Consequently, we concluded MDC staff subjected September 11 detainees to having both cell lights illuminated 24 hours a day for several months after they had the ability to independently control the lights.

### D. Personal Hygiene Items

Five of the 19 September 11 detainees we interviewed stated that they were deprived of personal hygiene items. According to applicable BOP policies, the MDC should have provided each detainee with one fresh towel each week and should have allowed each detainee to have one bar of soap. Two detainees stated that they were not given towels or soap during their first month in the ADMAX SHU. One detainee complained that he was not allowed to keep a toothbrush, towel, or toilet paper in his cell. Another detainee stated that he did not regularly receive soap or toilet paper. The fifth detainee stated that he did not have toilet paper in his cell during his first three weeks in the ADMAX SHU.

The MDC Captain in charge of the ADMAX SHU told us that the MDC policy for issuing hygiene supplies to September 11 detainees initially was established on September 21, 2001. According to this policy,

> The SHU Lieutenant will supervise issuance of hygiene supplies every day. The SHU Officers will ensure the inmate receives toilet paper, toothbrush, toothpaste, etc. The security toothbrush is the only authorized toothbrush for use on this unit. The hygiene supplies will be provided to the inmate and then retrieved by the officers a short time later [emphasis added].

The Captain said that correctional officers issued hygiene supplies to the detainees each day according to this policy. He confirmed that all hygiene supplies were removed after use. Further, he stated that detainees were not permitted to keep toilet paper in their cells. When asked about the detainees' complaints, the Captain expressed disbelief that detainees failed to receive personal hygiene items. The Captain said the policy was modified on October 15, 2001, by eliminating the sentence, "The hygiene supplies will be provided to the inmate and then retrieved by the officers a short time later."

### E. Hunger Strikes

Seven of the 19 September 11 detainees we interviewed stated they participated in a hunger strike while housed in the ADMAX SHU as a protest against their incarceration and their conditions of confinement. The detainees told the OIG that they were just "immigration violators" and not drug dealers or criminals and that confinement in the ADMAX SHU was "excessive punishment."

According to BOP policy, an inmate must refuse nine consecutive meals before it considers the inmate to be on

a hunger strike.[129] When a detainee or inmate refuses nine meals, facility medical staff is required to carefully monitor the individual by weighing them daily and checking blood sugar levels frequently.

The MDC provided us with 18 ADMAX SHU reports for information about September 11 detainees on hunger strikes. According to these reports, for a 3-day period beginning November 27, 2001, 20 out of 46 detainees in the ADMAX SHU declared themselves to be on a hunger strike. Among the reasons cited on the ADMAX SHU reports by the detainees for refusing meals were "left for over 60 days with no visits from INS or the FBI, uncertainty over their future, confinement in Special Housing instead of general population, and limited visits and telephone calls." By November 29, 2001, all of the detainees had ended their hunger strikes, according to the ADMAX SHU reports, after many of the detainees received visits from their attorneys.

**Case Study 4:**

A September 11 detainee arrived at the MDC on February 17, 2002, and began a hunger strike in late March 2002. According to the ADMAX SHU reports, the detainee began his hunger strike to protest his confinement in the ADMAX SHU instead of the MDC's general population and because of the MDC's limitation on visits and telephone calls. The detainee also was upset because he was not allowed to see his wife until she proved that she was married to him.

[129] BOP Program Statement 5562.04, Inmate Hunger Strikes.

MDC staff began checking the detainee's blood sugar levels daily and offered him liquid nutritional supplements when he refused his ninth consecutive meal. By April 2, 2002, the detainee had missed a total of 17 consecutive meals. We could not determine how many more meals he missed because the next available ADMAX SHU report was dated April 6, 2002, and contained no mention of the continuing hunger strike. Therefore, we infer that the detainee ended his hunger strike sometime before April 6, 2002. The detainee told the OIG that he could not pinpoint the date he ended his hunger strike because he did not have access to a calendar.

## VIII. OIG ANALYSIS

In the aftermath of the September 11 attacks, 184 aliens arrested on immigration charges were confined in high-security federal prisons, as opposed to less restrictive INS detention facilities. Eighty-four of these aliens were held at the MDC in Brooklyn, New York. These MDC detainees were held under "the most restrictive conditions possible," which included "lockdown" for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells. To this end, the MDC created an ADMAX SHU specifically to confine the September 11 detainees.

The BOP played no role in deciding the security risk posed by individual September 11 detainees or their potential connections to terrorism. As discussed in Chapter 4, these decisions were made by the FBI in consultation with the U.S. Attorney's Office in the Southern District of New York and were communicated to the INS,

whose agents generally arrested the aliens as part of a Joint Terrorism Task Force effort.

However, once the FBI characterized a detainee as "high interest" and the INS transferred the detainee to BOP rather than INS custody, the BOP took responsibility for the detainee's confinement. In the heightened state of alert after the terrorist attacks, the BOP combined a series of existing policies and procedures that applied to inmates in other contexts and applied them to the detainees they received after September 11, such as designating September 11 detainees as WITSEC inmates.

As a threshold matter, we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees. The arresting FBI agent usually made this assessment without any guidance and based on the initial detainee information available at the time of arrest. In addition, there was little consistency or precision to the process that resulted in detainees being labeled "high interest," "of interest," or "of undetermined interest." While many of these decisions needed to be made quickly and were based on less than complete information, we believe the FBI should have exercised more care in the classification process, given the significant ramifications on detainees' freedom of movement and association depending on whether they were confined in a high-security facility such as the MDC or a less restrictive facility such as Passaic (discussed in Chapter 8). More important, as discussed in Chapter 4, the FBI devoted insufficient resources to investigating or clearing most of these detainees, resulting in their prolonged confinement under extremely high security conditions. Even after clear-

ance, the BOP's delay in notifying the MDC lengthened even further these detainees' stay in the ADMAX SHU.

With regard to the conditions of confinement for detainees at the MDC, we appreciate that the influx of high-security detainees stretched MDC resources to their limit, with MDC staff members often working double shifts to monitor the detainees during a highly emotional period of time. We also appreciate the uncertainty surrounding these detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks. However, our review raises serious questions about the treatment of the September 11 detainees housed at the MDC in several regards.

First, BOP officials imposed a "communications blackout" specifically for September 11 detainees within a week of the terrorist attacks. During this blackout period, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any telephone calls or send mail. While we were unable to determine the exact length of this communications blackout, it appears to have lasted several weeks, after which time the September 11 detainees were permitted limited attorney and social contacts. During this time, attorneys and family members were unable to receive any information about these detainees, including where they were being held. While such a policy was within the BOP's discretion, we question the justification for a total communications blackout on all these individuals, particularly for the length of time that it was imposed. In addition, the telephone limitations imposed on this group of detainees —one legal telephone call per week and one social call per month—further hindered the detainees' ability to obtain legal assistance, which posed a significant problem

since the majority of the detainees entered the MDC without counsel.

Second, as noted above, the BOP initially designated all September 11 detainees as WITSEC inmates. Usually, this designation is applied to individuals who agree to cooperate with law enforcement by providing testimony against criminal suspects. Application of this WITSEC classification to the September 11 detainees, however, resulted in MDC officials continuing to withhold information about the detainees' location, even after the communications blackout was lifted.

This classification frustrated efforts by the detainees' attorneys, family members, and even law enforcement officers to determine where the detainees were being held. Because information on WITSEC inmates is tightly restricted, even MDC staff working at the front desk in the facility's lobby did not have access to information about the September 11 detainees. We found that MDC staff frequently—and mistakenly—told people who inquired about a specific detainee that the detainee was not held at the facility when, in fact, the opposite was true. Instead, the staff referred the caller or visitor to the BOP's Inmate Locator system for information about where an individual detainee was being held. But WITSEC inmates are not listed in this public system because of security reasons, and this prevented attorneys or family members from locating these September 11 detainees. We fault the MDC for not considering in a more timely manner the implications of labeling these September 11 detainees as WITSEC detainees and for not properly communicating to its employees—especially its staff who worked the facility's front desk—about the

classification issues affecting September 11 detainees and how to properly address inquiries from the public.

The BOP tried at least twice to address this situation by reclassifying the September 11 detainees, first by renaming them "Group 155" inmates. Even then we found the BOP continued to use "WITSEC" as its primary designation. On October 31, 2001, the BOP reclassified the detainees as "Special SIS Cases." Neither reclassification alleviated the access issues confronted by detainees' attorneys and family members. In fact, we found that as late as March 1, 2002—more than six months after the first September 11 detainees arrived at the MDC—the BOP's initial decision to classify the detainees as WITSEC inmates continued to cause confusion and resulted in attorneys being told incorrectly that their clients were not being held at the MDC.

We understand the MDC's efforts to follow instructions from BOP Headquarters and confine the September 11 detainees under secure conditions. That said, the detainees were pretrial inmates, most of whom had not obtained legal representation by the time they were confined at the MDC. Consequently, their designation by BOP officials as WITSEC inmates hindered the detainees' efforts to contact legal counsel and their families. We also believe the BOP should have taken timelier and more effective steps to address the situation after it realized the impact this designation was having on the September 11 detainees and the ability of their attorneys and families to locate them.

Third, with regard to the policies within the MDC for confining the September 11 detainees, MDC officials used existing BOP policies applicable to inmates in disciplinary segregation, and confined the September 11

detainees in the ADMAX SHU. The detainees were placed in restraints whenever they were outside their cells, including handcuffs, leg irons, and heavy chains. Four staff members were required to be present each time a detainee was placed into restraints and escorted from a cell. The detainees also were required to remain in restraints during their non-contact visits with their attorneys or family members.

Because of these restrictive conditions, we believe it was important for the FBI, INS, and BOP to determine, in a reasonable time frame, whether these detainees were connected to terrorism or whether they could be cleared to be moved from the ADMAX SHU to the MDC's much less restrictive general population. Yet, detainees remained in the ADMAX SHU for a long period of time waiting for the FBI's clearance process which, as we described in Chapter 4, was excessively slow. Even when the FBI cleared the detainees, they remained in the ADMAX SHU for days and sometimes weeks longer than necessary due to delays between the time the FBI cleared a detainee of a connection to terrorism and the time the MDC received formal notification of the clearance. In addition, we found that the MDC did not consistently follow its established procedures. Without explanation, it released at least four September 11 detainees from the ADMAX SHU prior to receiving clearance from the FBI that the detainee had no links to terrorism.

Fourth, the restrictive conditions imposed by the MDC prevented the detainees from obtaining counsel in a timely fashion. The BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Consequently, the policy regulating the frequency and duration

of legal telephone calls established by the MDC for September 11 detainees—while complying with very broad BOP national standards—severely limited the detainees' ability to obtain and consult with legal counsel.

As mentioned previously, most September 11 detainees did not have legal representation prior to their detention at the MDC (only 2 of the 19 detainees we interviewed had hired legal counsel before they entered the MDC). The MDC imposed a policy that permitted September 11 detainees housed in the ADMAX SHU only one legal call per week. This type of policy is more appropriate for pre-trial inmates who have obtained counsel prior to their incarceration rather than for inmates like the September 11 detainees who needed to find counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees by the INS through EOIR contained inaccurate and outdated information. As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees. In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed legal call. We believe that counting calls that only reached a voicemail, resulted in a busy signal, or went to the wrong number was unduly restrictive and inappropriate.

In addition, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear and inappropriate. In many instances, the unit counselor inquired whether September 11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "are you okay?" For some period, several detainees told the OIG that they did not realize that an affirmative response to this rather casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?"

Our review determined that the MDC officials recognized their obligation to permit representatives from foreign consulates to visit with detainees and established a clearance procedure to facilitate these visits. However, we found that consular representatives experienced the same difficulties as attorneys in obtaining access to detainees due to the BOP's categorization of the detainees as WITSEC inmates. In addition, the MDC's classification of detainee calls to their consulates as "social calls" severely limited the detainees' ability to contact their consulates in a timely manner, given the MDC's limit of one social call per month for detainees.

Fifth, the restrictive BOP policies and the classification of September 11 detainees also hindered family visits. Although MDC management tried to train reception area staff on proper procedures for granting visitation to detainee family members, problems persisted even many months after September 11.

Sixth, with regard to allegations of physical and verbal abuse, we concluded that the evidence indicates a pattern of abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks. Most detainees we interviewed at the MDC alleged that MDC staff physically abused them. Many also told us that that MDC staff verbally abused them with such taunts as "Bin Laden Junior" or with threats such as "you will be here for the next 20-25 years like the Cuban people." Although most correctional officers denied such physical or verbal abuse, the OIG's ongoing investigation of complaints of physical abuse developed significant evidence that it had occurred, particularly during intake and movement of prisoners.[130]

Seventh, MDC staff failed to inform detainees in a timely manner about the process for filing complaints about their treatment. Only 1 of the 19 detainees we interviewed said he received a facility handbook when he arrived that described the formal complaint process. Ten detainees told the OIG they did not learn about the complaint resolution process until they received their facility handbook 4 to 6 months after arriving at the MDC.

The Associate Warden for Programs told the OIG that all September 11 detainees received a facility handbook when they were processed into the MDC. Yet, even if the detainees received handbooks, staff apparently confiscated them as unacceptable items to retain in their ADMAX SHU cells. In addition, we found that a 2-page summary of MDC policies distributed to many of the

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[130] To date, our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it. However, our investigation is still ongoing.

detainees did not contain information about how to file a formal complaint. The haphazard fashion in which MDC staff handled dissemination of the facility handbook impeded the detainees' ability to seek review for their complaints about conditions of confinement at the MDC. If the detainees were not permitted to keep the facility handbook in their cells for security reasons, the MDC's 2-page summary of facility policies should have included information that described the process for filing a formal complaint.

Eighth, MDC staff appropriately took affirmative steps to prevent potential staff abuse against September 11 detainees—and protect MDC staff from unfounded allegations of abuse—by installing security cameras in each detainee's cell and by requiring staff to videotape all detainee movements outside their ADMAX SHU cells. However, the BOP's decision to permit MDC staff to destroy or reuse these videotapes after 30 days hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by individual detainees. We understand the difficulty in storing the hundreds of videotapes the MDC accumulated after several months of taping the detainees. But the decision to recycle or destroy the videotapes created problems regarding allegations of physical abuse at the MDC. Detainees were unable to use videotape evidence to support allegations of abuse filed more than 30 days after an alleged incident. Similarly, MDC staff had more difficulty refuting abuse allegations raised by detainees if the complaint was filed more than 30 days after the incident.

Given the proactive steps taken to prevent or document incidents of physical abuse against September 11 detainees, we believe rescinding the videotape retention

policy was unwise. If BOP and MDC management wanted to refute detainee allegations of abuse using videotape evidence, it was shortsighted on their part to assume that all such allegations would be made and resolved within 30 days.

Ninth, we found that recreation offered to the September 11 detainees was limited due to BOP security policies, the limited number of recreation cells within the ADMAX SHU, and lack of proper clothing that led detainees to regularly refuse recreation because it was offered most often in the early morning hours when it was colder in the open-air recreation cells.

Tenth, MDC staff subjected the September 11 detainees to having both lights illuminated in their cells 24 hours a day for several months longer than necessary, even after electricians rewired the ADMAX SHU range. Our review determined that, despite the initial representations to us by MDC officials, the MDC was able to reduce the amount of light in an individual detainee's cell as early as November 2001, but instead kept both cell lights illuminated until at least mid-March 2002. Eighteen of the 19 detainees we interviewed complained to the OIG about the difficulty of sleeping with both lights illuminated 24 hours a day, citing exhaustion, depression, stress, and sleep deprivation. The MDC had little reason for keeping the lights constantly illuminated for as long as it did.

In sum, we recognize the uncertainties and confusion surrounding the initial policies and treatment relating to these September 11 detainees. Much about these detainees was unknown, and the BOP had to accept the FBI's loosely applied assessment of these detainees as "of interest" to the terrorism investigation. However,

while we fault the FBI for the slowness of the clearance process, we believe the blackout and the initial WITSEC designation that the BOP imposed for several weeks was excessive, particularly because many of these detainees had no counsel or any contact with families. We also believe that the BOP instituted excessively restrictive policies on the detainees, particularly regarding telephone privileges. In addition, the BOP did not provide adequate information about the location of the detainees to the detainees' attorneys or their family members. These policies hindered the detainees' ability to obtain and consult with legal counsel and were more appropriate for detainees who had attorneys prior to arriving at the MDC. We also believe that some of the detainees were subject to physical or verbal abuse. Finally, we believe that some of the conditions of confinement were unnecessarily severe, such as two lights constantly illuminated in the detainees' cells. While the chaotic situation and the uncertainties surrounding the detainees' role in the September 11 attacks and the potential for additional terrorism explain some of these problems, they do not explain or justify all of them. We believe that the Department and the BOP should consider these issues carefully in an effort to avoid similar problems in the future.

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## CHAPTER NINE

## OIG RECOMMENDATIONS

We recognize the tremendous challenges the FBI, INS, BOP, and other Department components faced as they responded to the September 11 attacks and mobilized to prevent additional attacks during a chaotic peri-

od. We also recognize the dedication exhibited by many Department employees in response to the attacks. Without diminishing their contributions in any way, we believe the Department can learn from the experience in the aftermath of the September 11 attacks, and we therefore offer a series of recommendations to address the issues we examined in our review.

## I. UNIFORM ARREST AND DETAINEE CLASSIFICATION POLICIES

The FBI New York Field Office and its Joint Terrorism Task Force (JTTF) aggressively pursued thousands of PENTTBOM leads in the weeks and months after the terrorist attacks. Many leads that resulted in an alien's arrest on immigration charges were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant. However, we found the FBI and INS in New York City did little to distinguish the aliens arrested as the subjects of PENTTBOM leads or where there was evidence of ties to terrorism from those encountered coincidentally to such leads with no indication of any ties to terrorism.

The FBI's New York Field Office took an aggressive stance when it came to deciding whether any aliens arrested on immigration charges were "of interest" to its terrorism investigation. Witnesses both inside and outside the FBI told us that the New York FBI interpreted and applied the term "of interest" to the September 11 investigation quite broadly. Consequently, all aliens in violation of their immigration status that the JTTF encountered in the course of pursuing PENTTBOM leads —whether or not the subjects of the leads—were arrested, classified as September 11 detainees, and subjected to the full FBI clearance investigation, regardless of the

factual circumstances of the aliens' arrest or the absence of evidence connecting them to the September 11 attacks or terrorism. This contrasted with procedures used elsewhere in the country, where aliens were assessed individually before being considered "of interest" to the terrorism investigation and therefore subject to the full FBI clearance investigations.

Moreover, the FBI's initial "interest" classification had an enormous impact on the detainees because it determined whether they would be housed in a high-security BOP facility like the MDC or in a less restrictive setting like Passaic. In addition, the decision to label an alien a "September 11 detainee" versus a "regular immigration detainee" significantly affected whether bond would be available and the timing of the detainee's removal or release.

1. We believe the Department and the FBI should develop clearer and more objective criteria to guide its classification decisions in future cases involving mass arrests of illegal aliens in connection with terrorism investigations. For example, the FBI could develop generic screening protocols (possibly in a checklist format) to help agents make more consistent and uniform assessments of an illegal alien's potential connections to terrorism. These protocols might require some level of evidence linking the alien to the crime or issues in question, and might include an FBI database search or a search of other intelligence and law enforcement databases.

   In addition, the FBI should consider adopting a tiered approach to detainee background investigations that acknowledges the differing levels of

inquiry that may be appropriate to clear different detainees of connections to terrorism. For example, a more streamlined inquiry might be appropriate when the FBI has no information that a detainee has ties to terrorism, while a more comprehensive background investigation would be appropriate in other cases.

2. The FBI should provide immigration authorities (now part of the Department of Homeland Security (DHS)) and the BOP with a written assessment of an alien's likely association with terrorism shortly after an arrest (preferably within 24 hours). This, in turn, would assist the immigration authorities in assigning the detainee to an appropriate detention facility and the BOP in determining the appropriate security level within a particular facility. In addition, the FBI should promptly communicate any changes in its assessment of the detainee's connection to terrorism so that the DHS and BOP can make appropriate adjustments to the detainee's conditions of confinement.

3. The FBI did not characterize many of the September 11 detainees' potential connections to terrorism and consequently they were treated as "of undetermined interest" to the terrorism investigation. In these cases the INS, in an understandable abundance of caution, treated the alien as a September 11 detainee subject to the "hold until cleared/no bond" policies applicable to all September 11 detainees. This lack of a characterization by the FBI also resulted in prolonged confinement for many detainees, sometimes under

extremely harsh conditions. Unless the FBI labels an alien "of interest" to its terrorism investigation within a limited period of time, we believe the alien should be treated as a "regular" immigration detainee and processed according to routine procedures. In any case, the DHS should establish a consistent mechanism to notify the FBI of its plans to release or deport such a detainee.

## II. INTER-AGENCY COOPERATION ON DETAINEE ISSUES

The INS relied on the FBI to provide evidence about the detainees that it could use in bond and removal proceedings. When this information was not forthcoming in a timely manner, the INS had to request multiple continuances in bond hearings and other immigration proceedings in an effort to maintain the detainees in custody. In many of these cases, the INS's arguments against granting bond to the Immigration Court were based on little more than the fact the detainees were arrested in connection with PENTTBOM leads.

4. Unless the federal immigration authorities, now part of the DHS, work closely with the Department and the FBI to develop a more effective process for sharing information and concerns, the problems inherent in having aliens detained under the authority of one agency while relying on an investigation conducted by another agency can result in delays, continuing conflicts, and concerns about accountability. At a minimum, we recommend that immigration officials in the DHS enter into an Memorandum of Understanding (MOU) with the Department and the FBI to formalize

policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. An MOU should specify a clear chain of command for any inter-agency working group. Further, the MOU should specify information sharing and reporting requirements for all members of such an inter-agency working group.

## III. FBI CLEARANCE PROCESS

While we appreciate the enormous demands placed on the FBI in the aftermath of the terrorist attacks, we found the FBI did not adequately staff or assign sufficient priority to its process for clearing September 11 detainees of a connection to terrorism. Agents responsible for clearance investigations often were assigned to other duties, which substantially delayed the completion of detainee clearance investigations. Even after the clearance decisions were centralized at FBI Headquarters, FBI officials failed to provide sufficient resources to complete the detainee clearance process in a timely manner. The FBI took, on average, 80 days to clear a September 11 detainee.

5. We believe it critical for the FBI to devote sufficient resources in its field offices and at Headquarters to conduct timely clearance investigations on immigration detainees, especially if the Department institutes a "hold until cleared" policy. The FBI should assign sufficient resources to conduct the clearance investigations in a reasonably expeditious manner, sufficient resources to provide timely information to other agencies (in this case, additional FBI agents to support the SIOC Working Group), and sufficient resources to review in a timely manner the results of inquiries

of other agencies (in this case, completed CIA checks). In addition, FBI Headquarters officials who coordinated the detainee clearance process and FBI field office supervisors whose agents were conducting the investigations should impose deadlines on agents to complete background investigations or, in the alternative, reassign the cases to other agents.

6. We understand the resource constraints confronting the Department in the days and weeks immediately following the September 11 attacks. We also recognize that decisions needed to be made quickly and often without time to consider all the ramifications of these actions. However, within a few weeks of the terrorist attacks it became apparent to many Department officials that some of the early policies developed to support the PENTTBOM investigation were causing problems and should be revisited. Examples of areas of concern included the FBI's criteria for expressing interest in a detainee and the "hold until cleared" policy. We believe the Department should have, at some point earlier in the PENTTBOM investigation, taken a closer look at the policies it adopted and critically examined the ramifications of those policies in order to make appropriate adjustments. We recommend that the Department develop a process that forces it to reassess early decisions made during a crisis situation and consider any improvements to those policies.

## IV. NOTICES TO APPEAR

Under federal regulation, the INS was required to decide whether to file immigration charges against an alien within 48 hours of his arrest. However, the regulation contained no requirement with respect to when the INS must notify the alien or Immigration Court about the charges. No statute or regulation explicitly stated when the INS was required to serve the Notice to Appear (NTA) on the alien or the Immigration Court. We found the INS did not consistently serve September 11 detainees with NTAs within its stated goal of 72 hours after arrest. Part of the delay can be traced to the INS's practice in the first several months after the terrorist attacks to having all NTAs reviewed for legal sufficiency at INS Headquarters. Another factor was the miscommunication that resulted when detainees arrested in New York City were transferred to the INS Newark District without having been served NTAs. INS Newark District officials assumed the detainees had been served in New York, while INS New York District officials incorrectly assumed that INS Headquarters had forwarded the NTAs to the INS Newark District for service. These delays affected the detainees' ability to obtain legal counsel and postponed the detainees' opportunity to seek a bond re-determination hearing.

7. We recommend that the immigration authorities in the DHS issue instructions that clarify, for future events requiring centralized approvals at a Headquarters' level, which District or office is responsible for serving NTAs on transferred detainees: either the District in which the detainee was arrested or the District where the detainee is transferred.

8. We recommend that the DHS document when the charging determination is made, in order to determine compliance with the "48-hour rule." We also recommend that the DHS convert the 72-hour NTA service objective to a formal requirement. Further, we recommend that the DHS specify the "extraordinary circumstances" and the "reasonable period of time" when circumstances prevent the charging determination within 48 hours. We also recommend that the DHS provide, on a case-by-case basis, written justification for imposing the "extraordinary circumstances" exception and place a copy of this justification in the detainee's A-File.

## V. RAISING ISSUES OF CONCERN TO SENIOR DEPARTMENT OFFICIALS

Department officials established the "hold until cleared" policy believing that the FBI's clearance process for September 11 detainees would take just a few days. However, in many cases the clearance process stretched on for months and created dilemmas for INS attorneys who handled bond and removal proceedings. The slow pace of the FBI's background investigations, coupled with the lack of individualized evidence connecting specific detainees to terrorism, left INS attorneys with little evidence to argue for continued confinement of the detainees.

The evidence indicated that attorneys in the INS's Office of General Counsel made efforts to raise with some Department officials the issue of whether the INS could refuse to accept bond set by an Immigration Judge when the Government failed to appeal or block a detainee's departure from the country when he had received a final

removal order. Yet, when these efforts were unsuccessful, INS officials did not raise the issue at higher levels in the Department or submit their legal concerns in writing until months later.

9. We recommend that Offices of General Counsel throughout the Department establish formal processes for identifying legal issues of concern—like the perceived conflict between the Department's "hold until cleared" policy and immigration laws and regulations—and formally raise significant concerns, in writing, to agency senior management and eventually Department senior management for resolution. Such processes will be even more important now that immigration responsibilities have transferred from the Department to the DHS.

## VI. BOP HOUSING OF DETAINEES

At least 84 September 11 detainees arrested on immigration charges in connection with the September 11 investigation were confined at the MDC. The BOP housed these detainees in its ADMAX SHU under extremely restrictive conditions. While the BOP played no role in deciding which detainees were "of interest" or "of high interest" to the FBI, once detainees were transferred to one of its facilities the BOP assumed responsibility for the detainees' conditions of confinement.

The BOP combined a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement for September 11 detainees held at the MDC and other BOP facilities. For example, the BOP initially designated September 11 detainees as witness security (WITSEC)

inmates, a categorization that restricted public knowledge of and access to the detainees. This designation frustrated efforts by detainees' attorneys, family members, consular officials, and even law enforcement officers to determine the detainees' location, given how tightly information about WITSEC inmates is held. In addition, the BOP's initial communications blackout and its policy of permitting detainees one legal call per week (coupled with arbitrary policies on whether reaching an answering machine counted as the legal call), severely limited the detainees' ability to contact and consult with legal counsel.

10. We recommend that the BOP establish a unique Special Management Category other than WITSEC for aliens arrested on immigration charges who are suspected of having ties to terrorism. Such a classification should identify procedures that permit detainees' reasonable access to telephones more in keeping with the detainees' status as immigration detainees who may not have retained legal representation by the time they are confined rather than as pre-trial inmates who most likely have counsel. In addition, BOP officials should train their staff on any new Special Management Category to avoid repeating situations such as when MDC staff mistakenly informed people inquiring about a specific September 11 detainee that the detainee was not held at the facility.

11. Given the highly restrictive conditions under which the MDC housed September 11 detainees, and the slow pace of the FBI's clearance process, we believe the BOP should consider requiring written

assessments from immigration authorities and the FBI prior to placing aliens arrested solely on immigration charges into highly restrictive conditions, such as disciplinary segregation in its ADMAX SHU. Absent such a particularized assessment from the FBI and immigration authorities, the BOP should consider applying its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

12. We found delays of days and sometimes weeks between when the FBI notified the BOP that a September 11 detainee had been cleared of ties to terrorism and when the BOP notified the MDC that the detainee could be transferred from its ADMAX SHU to the facility's general population, where conditions were decidedly less severe. We recommend that BOP Headquarters develop procedures to improve the timeliness by which it informs local BOP facilities when the detention conditions of immigration detainees can be normalized.

13. We found evidence indicating a pattern of physical and verbal abuse by some MDC corrections staff against some September 11 detainees. While the OIG is continuing its administrative investigation into these matters, we believe MDC and BOP management should take aggressive and proactive steps to educate its staff on proper methods of handling detainees (and inmates) confined in highly restrictive conditions of confinement, such as the ADMAX SHU. The BOP must be vigilant to ensure that individuals in its custody are not

subjected to harassment or more force than necessary to accomplish appropriate correctional objectives.

14. BOP and MDC officials anticipated that some September 11 detainees might allege they were subject to abuse during their confinement. Consequently, they took steps to help prevent or refute such allegations by installing cameras in each ADMAX SHU cell and requiring staff to videotape all detainees' movements outside their cells. Unfortunately, the MDC destroyed the tapes after 30 days. We recommend that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism housed in ADMAX SHU units be retained for at least 60 days.

15. We recommend that the BOP ensure that all immigration detainees housed in a BOP facility receive full and timely written notice of the facility's policies, including procedures for filing complaints. We found that the MDC failed to consistently provide September 11 detainees with details about its Administrative Remedy Program, the formal process for filing complaints of abuse.

16. Some MDC correctional staff asked detainees "are you okay" as a way to inquire whether they wanted their once-a-week legal telephone call. Detainees told the OIG that they misunderstood this question and, consequently, unknowingly waived their opportunity to place a legal call. We recommend that the BOP develop a national policy requiring detainees housed in SHUs to affirm their request for or refusal of a legal telephone

call, and that such affirmance or refusal be recorded in the facility's Legal Call Log.

17. We recommend that the MDC examine its ADMAX SHU policies and practices in light of the September 11 detainees' experiences to ensure their appropriateness and necessity. For example, we found that while the MDC offered September 11 detainees exercise time in the facility's open-air recreation cell, they failed to provide suitable clothing during the winter months that would enable the detainees to take advantage of this opportunity. In addition, we found that the MDC kept both lights on in the detainees' cells 24 hours a day for several months after they had the ability to turn off at least one of the cell lights.

## VII. OVERSIGHT OF DETAINEES HOUSED IN CONTRACT FACILITIES

18. INS Newark District staff conducted insufficient and irregular visits to September 11 detainees held at Passaic. We also found that Passaic officials did not always inform Newark staff when detainees were placed in the SDU and that Newark officials did not always maintain required records for SDU detainees. Consequently, Newark staff was unable to consistently monitor detainee housing conditions, health issues, or resolve complaints. We recommend that the DHS amend its detention standards to mandate that District Detention and Removal personnel visit immigration detainees at contract facilities like Passaic frequently, with special emphasis on those detainees placed in SDUs, in order to monitor matters such as housing conditions, health concerns,

and complaints of abuse. District visits should include an interview of and a review of the records for detainees housed in SDUs. We further recommend that the DHS issue procedures to mandate that contract detention facilities transmit documentation to the appropriate DHS field office that describes the reasons why immigration detainees have been sent to SDUs.

19. We recommend that DHS field offices conduct weekly visits with detainees arrested in connection with a national emergency like the September 11 attacks to ensure that they are housed according to FBI threat assessments and BOP classifications (or other appropriate facility classification systems). In addition, the DHS should ensure that the detainees have adequate access to counsel, legal telephone calls, and visitation privileges consistent with their classification.

## VIII. OTHER ISSUES

20. How long the INS legally could hold September 11 detainees after they have received final orders of removal or voluntary departure orders in order to conduct FBI clearance checks was the subject of differing opinions within the INS and the Department. A February 2003 opinion by the Department's Office of Legal Counsel concluded, however, that the INS could hold a detainee beyond the normal removal time for this purpose. That issue is also a subject in an ongoing lawsuit.

    Regardless of the outcome of the court case, we concluded that the Department failed to turn its attention in a timely manner to the question of its

authority to detain such individuals. Where policies are implemented that could result in the prolonged confinement of illegal aliens, we recommend that the Department carefully examine, at an early stage, the limits on its legal authority to detain these individuals.

21. The INS failed to consistently conduct Post-Order Custody Reviews of September 11 detainees held more than 90 days after receiving final orders of removal. These custody reviews are required by immigration regulations to assess if detainees' continued detention is warranted. We understand that under Department policy in effect at the time, the INS was not permitted to remove September 11 detainees until it received FBI clearances. We believe the INS nevertheless should have conducted the custody reviews, both because they are required by regulation and because such reviews may have alerted Department officials even more directly that a number of aliens were being held beyond the 90-day removal period. We recommend that the DHS ensure that its field offices consistently conduct Post-Order Custody Reviews for all detainees who remain in its custody after the 90-day removal period.

## CHAPTER TEN

## CONCLUSIONS

In the aftermath of the September 11 terrorist attacks, the Department of Justice used the federal immigration laws to detain aliens who were suspected of having ties to the attacks or terrorism in general. More than 750 aliens who had violated immigration laws were arrested and detained in connection with the FBI's investigation into the attacks, called PENTTBOM. Our review examined the treatment of these detainees, including their processing, bond decisions, the timing of their removal or release, their access to counsel, and their conditions of confinement. To examine these issues, we focused on the detainees held at the BOP's Metropolitan Detention Center in Brooklyn, New York, and at the Passaic County Jail in Paterson, New Jersey, because the majority of September 11 detainees were held in these two facilities, and because many complaints arose regarding their treatment.

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges.

It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation. In other times, many of these aliens might not have been arrested or detained for these violations. However, the September

11 attacks changed the way the Department, particularly the FBI and the INS, responded when encountering aliens who were in violation of their immigration status. It was beyond the scope of this review to examine the specific law enforcement decisions regarding who to arrest or detain. Rather, we focused primarily on the treatment of the aliens who were detained.

While recognizing the difficult circumstances confronting the Department in responding to the terrorist attacks, we found significant problems in the way the September 11 detainees were treated. The INS did not serve notices of the immigration charges on these detainees within the specified timeframes. This delay affected the detainees in several ways, from their ability to understand why they were being held, to their ability to obtain legal counsel, to their ability to request a bond hearing.

In addition, the Department instituted a policy that these detainees would be held until cleared by the FBI. Although not communicated in writing, this "hold until cleared" policy was clearly understood and applied throughout the Department. The policy was based on the belief—which turned out to be erroneous—that the FBI's clearance process would proceed quickly. Instead of taking a few days as anticipated, the clearance process took an average of 80 days, primarily because it was understaffed and not given sufficient priority by the FBI.

We also found that the FBI and the INS in New York City made little attempt to distinguish between aliens who were subjects of the PENTTBOM investigation and those encountered coincidentally to a PENTTBOM lead. Even in the chaotic aftermath of the September 11 attacks, we believe the FBI should have taken more care to

distinguish between aliens who it actually suspected of having a connection to terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. Alternatively, by early November 2001, when it became clear that the FBI could not complete its clearance investigations in a matter of days or even weeks, the Department should have reviewed those cases and kept on the list of September 11 detainees only those for whom it had some basis to suspect a connection to terrorism.

The FBI's initial classification decisions and the untimely clearance process had enormous ramifications for the September 11 detainees. The Department instituted a "no bond" policy for all September 11 detainees. The evidence indicates that the INS raised concerns about this blanket "no bond" approach, particularly when it became clear that the FBI's clearance process was slow and the INS had little information in many individual cases on which to base its continued opposition to bond. The INS also raised concerns about the legality of holding aliens to conduct clearance investigations after they had received final orders of removal or voluntary departure orders. We found that the Department did not address these legal issues in a timely way.

The FBI's classification of the detainees and the slow clearance process also had important ramifications on their conditions of confinement. Many aliens characterized by the FBI as "of high interest" to the September 11 investigation were detained at the MDC under highly restrictive conditions. While the FBI's classification decisions needed to be made quickly and were based on less than complete information, we believe the FBI should

have exercised more care in the process, since it resulted in the MDC detainees being kept in the highest security conditions for a lengthy period. At the least, the FBI should have conducted more timely clearance checks, given the conditions under which the MDC detainees were held.

Our review also raised various concerns about the treatment of these detainees at the MDC. For example, we found that MDC staff frequently—and mistakenly—told people who inquired about a specific September 11 detainee that the detainee was not held at the facility when, in fact, the opposite was true. In addition, the MDC's restrictive and inconsistent policies on telephone access for detainees prevented them from obtaining legal counsel in a timely manner.

With regard to allegations of abuse, the evidence indicates a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks. Although most correctional officers denied any such physical or verbal abuse, our interviews and investigation of specific complaints developed evidence that abuse had occurred.

We also concluded that, particularly at the MDC, certain conditions of confinement were unduly harsh, such as illuminating the detainees' cells for 24 hours a day. Further, we found that MDC staff failed to inform MDC detainees in a timely manner about the process for filing complaints about their treatment.

The September 11 detainees held at Passaic had much different, and significantly less harsh, experiences than the MDC detainees. The Passaic detainees were housed

in the facility's general population and treated like other INS detainees held at the facility. Although we received some allegations of physical and verbal abuse, we did not find evidence of a pattern of abuse at Passaic as we did at the MDC. However, we found that the INS did not conduct sufficient and regular visits to Passaic to ensure the conditions of confinement were appropriate.

In sum, while the chaotic situation and the uncertainties surrounding the detainees' connections to terrorism explain some of these problems, they do not explain them all. We believe the Department should carefully consider and address the issues described in this report, and we therefore offered a series of recommendations regarding the systemic problems we identified in our review. They include recommendations to ensure a timely clearance process; timely service of immigration charges; careful consideration of where to house detainees with possible connections to terrorism, and under what kind of restrictions; better training of staff on the treatment of these detainees; and better oversight of the conditions of confinement. We believe these recommendations, if fully implemented, will help improve the Department's handling of detainees in other situations, both larger scale and smaller scale, that may arise in the future.

[4/29/03]
Date

/s/ GLENN A. FINE
GLENN A. FINE
Inspector General

# APPENDIX A

## GLOSSARY OF NAMES IN THE REPORT

| | |
|---|---|
| Ashcroft, John | Attorney General of the United States |
| Ayers, David | Chief of Staff to the Attorney General |
| Becraft, Michael | Acting Deputy Commissioner, Immigration and Naturalization Service |
| Bendl, Brian | Deputy Warden, Passaic County Jail |
| Cadman, Daniel | Director, National Security Unit, Field Operations Division (INS) |
| Carpenter, Dea | Deputy General Counsel (INS) |
| Caruso, Tim | Deputy Executive Assistant Director (FBI) |
| Cerda, Victor | Chief of Staff to the Commissioner (INS) |
| Chertoff, Michael | Assistant Attorney General, Criminal Division (Department of Justice) |
| Cooksey, Michael | Assistant Director for Correctional Programs (BOP) |
| Cooper, Owen ("Bo") | General Counsel (INS) |
| Elwood, Kenneth | District Director, Philadelphia District (INS) |

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|---|---|
| Fisher, Alice | Deputy Assistant Attorney General, Criminal Division (Department of Justice) |
| Hussey, Thomas | Director, Office of Immigration Litigation, Civil Division (Department of Justice) |
| Israelite, David | Deputy Chief of Staff to the Attorney General |
| Kelley, David | Deputy United States Attorney, Southern District of New York (Department of Justice) |
| Kerr, Raymond | Supervisory Special Agent in Charge, I-44A Squad, New York Field Office (FBI) |
| Kinnally, Tom | Chief, National Domestic Preparedness Office (FBI) |
| Laufman, David | Chief of Staff to the Deputy Attorney General |
| Levey, Stuart | Associate Deputy Attorney General |
| Levin, Dan | Counselor to the Attorney General |
| Maxwell, Kenneth | Assistant Special Agent in Charge, New York Field Office (FBI) |
| Meyers, Charles | Warden, Passaic County Jail |
| Molerio, Dan | Assistant District Director for Investigations, INS New York District |

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|---|---|
| Mueller, Robert | Director, Federal Bureau of Investigation |
| Parkinson, Larry | General Counsel (FBI) |
| Pearson, Michael | Executive Associate Commissioner for Field Operations (INS) |
| Perkins, Kevin | Section Chief, Inspection Division (FBI) |
| Pickard, Thomas | Deputy Director, Federal Bureau of Investigation |
| Quarantillo, Andrea | District Director, Newark District (INS) |
| Rardin, David | Former Director, Northeast Region (BOP) |
| Ray, Mickey | Director, Northeast Region (BOP) |
| Rolince, Michael | Chief, International Terrorism Operations Section, Counterterrorism Division (FBI) |
| Rozos, Michael | Chief, Long Term Review Branch (INS) |
| Thompson, Larry | Deputy Attorney General |
| Vanyur, John | Senior Deputy Assistant Director, Correctional Programs Division (BOP) |
| Venturella, David | Deputy Executive Associate Commissioner, Office of Detention and Removal (INS) |

| | |
|---|---|
| Watson, Dale | Assistant Director, Counter terrorism Division (FBI) |
| Wray, Chris | Principal Associate Deputy Attorney General |
| Zenk, Michael | Warden, Metropolitan Detention Center (BOP) |
| Ziglar, James | Commissioner, Immigration and Naturalization Service |

Note: Individuals mentioned by name in the report are, for the most part, identified using the titles they held at the time of the event or action under examination.

## APPENDIX B

## GLOSSARY OF TERMS

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| ADMAX SHU | Administrative Maximum Special Housing Unit (BOP) |
| A-File | Alien File—maintained by the INS; contains an alien's immigration history. |
| BIA | Board of Immigration Appeals, Department of Justice |
| BOP | Federal Bureau of Prisons |
| BOP Region | The BOP divides the United States into six regions; each region is responsible for BOP facilities located within its jurisdiction. |
| CIA | Central Intelligence Agency |
| CRU | Custody Review Unit (INS) |

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| Department | U.S. Department of Justice |
| DHS | Department of Homeland Security |
| D&R | Office of Detention and Removal —the INS division responsible for detaining aliens pending their removal from the United States for violating immigration laws. |
| EC | Electronic communication refers to a messaging system used by the FBI to electronically communicate between FBI offices or within an FBI office. |
| EOIR | Executive Office of Immigration Review (Department of Justice) |
| FBI | Federal Bureau of Investigation |
| FBI Field Office | The FBI operates 56 Field Offices located in cities throughout the United States. |
| *Habeas corpus* | Latin term literally translated as "that you may have the body," refers to a legal pleading in which a federal court is requested to order a government official to undertake a particular action. |
| I-44A Squad | Unit created by the FBI's New York Field Office to follow up on PENTTBOM leads. This squad also had responsibility for clearing detainees arrested in connection with the PENTTBOM in- |

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| | vestigation in the New York City area. |
| IGA | Intergovernmental Service Agreement; in this review, relates to a contracts between government agencies to provide services. |
| INA | Immigration and Nationality Act —created by Pub. L. No. 82-414 (1952) and as amended by Pub. L. No. 107-296 (2002). |
| INS | Immigration and Naturalization Service (as of March 1, 2003, part of the Department of Homeland Security) |
| INS Custody List | The list maintained by the INS containing names of September 11 detainees. |
| INS District | The INS operated 33 Districts located in cities throughout the United States; each District was responsible for administering immigration programs within its jurisdiction. |
| INS Form G-28 | Notice of Entry of Appearance as Attorney or Representative— filed with the INS by the attorney of record representing a detainee. |
| INS Form I-213 | Record of Deportable/Inadmissible Alien—the INS arrest report. |

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| INS Form I-286 | Notice of Custody Determination —form used by an INS detainee to request a bond re-determination hearing. |
| INS Form I-862 | Notice to Deportable Alien—also known as the Notice to Appear or NTA (the "charging document" in an immigration case). |
| INS Region | The INS field structure included three regions—Eastern, Central, and Western—that reported to INS Headquarters and were responsible for administering immigration programs within their jurisdictions. |
| ITOS | International Terrorism Operations Section, Counter-terrorism Division (FBI) |
| JTTF | Joint Terrorism Task Force—multi-agency terrorism task force led by the FBI. |
| Management Interest Group 155 | Second designation applied to September 11 detainees held at MDC (first designation was "Witness Security" inmates or WITSEC). |
| MCC | Metropolitan Correctional Center in Manhattan, New York (BOP) |
| MDC | Metropolitan Detention Center in Brooklyn, New York (BOP) |

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| NSLD | National Security Law Division, Office of the General Counsel (INS) |
| NSLU | National Security Law Unit, OGC (FBI) |
| NSU | National Security Unit, Field Operations Division (INS) |
| NTA | Notice to Appear—INS Form I-862, Notice to Deportable Alien (the "charging document" in an immigration case). |
| OGC | Office of General Counsel |
| OIG | Office of the Inspector General (Department of Justice) |
| OIL | Office of Immigration Litigation, Civil Division (Department of Justice) |
| OLC | Office of Legal Counsel (Department of Justice) |
| Passaic County Jail | Referred to as "Passaic" in the report, the jail is located in Paterson, New Jersey. |
| PENTTBOM | Name given to the FBI's investigation of the September 11, 2001, Pentagon/Twin Towers Bombings. |
| POCR | Post Order Custody Review—the INS review required after a detainee has remained in INS custody for 90 days after issu- |

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| | ance of a final order of removal by an Immigration Judge. The purpose of the review is to determine whether the detainee's continued detention is warranted. |
| Pro Bono List | A list of attorneys willing to represent immigration clients without compensation. The INS is required to provide this list to detainees. |
| SENTRY | Database used by the BOP to monitor the movement and management of all BOP inmates. |
| SDO | Supervisory Detention Officer (INS) |
| SDU | Special Detention Unit (Passaic) |
| SHU | Special Housing Unit (MDC) |
| SIOC | Strategic Information and Operations Center at FBI Headquarters in Washington, D.C. |
| SIOC Working Group | Group established to coordinate efforts among the various Department components that had an investigative interest in or responsibility for the September 11 detainees. This group became known as the "SIOC Working Group" because its initial meetings took place in the FBI's SIOC. Members of the group |

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| | included representatives from the FBI, INS, the Department's Office of Immigration Litigation, the Terrorism and Violent Crime Section of the Department's Criminal Division, and the Office of the Deputy Attorney General. |
| SPC | Service Processing Center—facility where the INS processes and detains illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country. |
| Special SIS Case | Third designation used by the BOP for September 11 detainees. The MDC's Special Investigative Staff (SIS) supervised information and visitation policies concerning September 11 detainees. |
| SSA | Supervisory Special Agent (INS, FBI) |
| TVCS | Terrorism and Violent Crime Section, Criminal Division (Department of Justice) |
| USA PATRIOT ACT | The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Pub. L. No. 107-56 (2001). |
| USMS | United States Marshals Service |

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| WITSEC | "Witness Security" inmate—WITSEC was the first designation applied by the BOP to the September 11 detainees. |

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## APPENDIX K

[SEAL OMITTED]

**U.S. Department of Justice**

Office of the Deputy Attorney General

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The Deputy Attorney General

Washington, D.C. 20530

Apr. 4, 2003

MEMORANDUM TO: GLENN A. FINE
INSPECTOR GENERAL

FROM: LARRY D. THOMPSON
DEPUTY ATTORNEY GENERAL

SUBJECT: DIG Review of September 11 Detainees

I am writing in response to your request that I review and comment on the OIG's Draft Report concerning the September 11 detainees.

In considering the issues raised about the detention and removal of the September 11 detainees, in Chapter Six, it is important to take into account the circumstances and atmosphere within the Department of Justice during

that period. On September 11, 2001, terrorists murdered 3,000 innocent people on American soil. The period thereafter was one of tremendous intensity as the Department was required immediately to alter its central mission to the prevention of further acts of terrorism.

The circumstances required the Department to respond, in a crisis atmosphere, to hundreds of novel issues. The members of my staff who tried to coordinate these issues had to shoulder a monumental task and workload. They had a great number of other responsibilities during this period as part of our comprehensive effort to protect the American people from further acts of terrorism.

The detention of those illegal aliens suspected of involvement with terrorism was paramount to that mission. My staff understood that the immigration authorities of the Department should be used to keep such people in custody until we could satisfy ourselves—by the FBI clearance process—that they did not mean to do us harm.

Given those circumstances, I respectfully submit that it is unfair to criticize the conduct of members of my staff during this period. In light of the imperative placed on these detentions by the Department, I would not have expected them to reconsider the detention policy in the absence of a clear warning that the law was being violated. It is clear from the Draft Report that that did not occur until January 2002. When the issue was squarely presented, it is apparent that they promptly did the right thing: they changed the policy.

To the extent that OIG still believes that criticism is warranted, I ask that it be directed at my Office as a whole rather than at the individual members of my staff

who, as indicated above, acted in accordance with my expectations.

I ask that you include the text of this letter in the section of your report analyzing the removal of the September 11 detainees.

**U.S. Department of Justice**
Office of the Inspector General

# Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York

Office of the Inspector General

Dec. 2003

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## I. INTRODUCTION

This report details the investigation conducted by the Office of the Inspector General (OIG) concerning allegations that staff members of the Federal Bureau of Prisons' (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York, physically and verbally abused aliens who were detained in connection with the terrorist attacks of September 11, 2001.[1] In June 2003, we issued a broader, 198-page report evaluating the treatment of 762 detainees who were held on immigration charges in connection with the investigation of the September 11 attacks.[2] In that report, we examined how the Department of Justice (Department) handled these detainees, including their processing, their bond decisions, the timing of their removal from the United States or their release from custody, their access to counsel, and their conditions of confinement.

In Chapter 7 of the Detainee Report, we described the treatment of September 11 detainees in the MDC, and we concluded that the conditions were excessively restrictive and unduly harsh. Those conditions included inadequate access to counsel, sporadic and mistaken information to detainees' families and attorneys about where they were being detained, lockdown for at least 23

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[1] In this report, "staff members" refers to MDC employees, including correctional officers, lieutenants, management officials, and other personnel.

[2] See "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("Detainee Report"), issued June 2, 2003. The report is located on the OIG's website at http://www.usdoj.gov/oig/special/03-06/index.htm.

hours a day, cells remaining illuminated 24 hours a day, detainees placed in heavy restraints whenever they were moved outside their cells, limited access to recreation, and inadequate notice to detainees about the process for filing complaints about their treatment.

We also concluded in the Detainee Report that evidence showed some MDC correctional officers physically and verbally abused some September 11 detainees, particularly during the months immediately following the September 11 attacks. However, we noted in our report that our investigation of physical and verbal abuse was not completed, and we stated that we would provide our findings in a separate report. This report details our findings and conclusions from the investigation.

We have provided the results of our investigation to managers at BOP Headquarters for their review and appropriate disciplinary action. In the report to the BOP, we include an Appendix identifying those staff members who we believe committed misconduct or exercised poor judgment and setting forth the specific evidence against them. In the Appendix, we also describe the allegations against specific officers that we did not substantiate.

As discussed in detail below, our investigation developed evidence substantiating allegations that MDC staff members physically and verbally abused September 11 detainees. In the Appendix referenced above, we recommend that the BOP consider taking disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about our findings against them.

## A. Background

### 1. Detainee Arrival and Confinement at the MDC

As discussed in detail in the Detainee Report, the Department used federal immigration laws to detain aliens in the United States who were suspected of having ties to the September 11 attacks or connections to terrorism, or who were encountered during the course of the terrorism investigation conducted by the Federal Bureau of Investigation (FBI). In the first 11 months after the attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses, including overstaying their visas and entering the country illegally.

A total of 84 of these aliens were confined at the MDC on immigration charges in the 11 months after the attacks. The facility at which a September 11 detainee was confined was determined mainly by the FBI's assessment of the detainee's potential links to the September 11 investigation or ties to terrorism. The FBI assessed detainees as "high interest," "of interest," or "undetermined interest."[3] Generally, those labeled of "high interest" were confined at the MDC.

The MDC is a 9-story high-security BOP prison in Brooklyn, New York, that generally houses men and women either convicted of criminal offenses or awaiting

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[3] As we described in our Detainee Report, we concluded that the FBI in New York indiscriminately applied these labels to aliens and that the FBI took much longer than Department officials expected to clear these aliens of any connection to terrorism.

trial or sentencing.[4] The majority of the MDC inmates are housed in the facility's General Population Unit. Some inmates are confined in the Special Housing Unit (SHU), which normally holds inmates who are disruptive, pose a security risk, or need protection as witnesses. When MDC officials learned that they would receive aliens deemed potential suspects in the FBI's terrorism investigation, the MDC modified one wing of the SHU to accommodate these "high security" detainees and labeled the modified wing the "administrative maximum" or "ADMAX" SHU. The ADMAX SHU was designed to confine the detainees in the most restrictive and secure conditions permitted by BOP policy.

The detainees began to arrive at the MDC on September 14, 2001. They were transported often in armed convoys and generally by federal agents from the Immigration and Naturalization Service (INS). The transport vehicles holding the detainees entered the MDC through the U.S. Marshal's sally port, which is similar to a large garage and is connected to the Receiving and Discharge (R&D) area of the MDC. Once inside the sally port, the transport vehicle was met by four to seven BOP staff members who removed the detainee from the vehicle. The staff members then put the detainee next to a wall directly adjacent to the transport vehicle and performed a "pat search" during which the detainee was frisked and the restraints in which the detainee arrived were exchanged for BOP restraints. The BOP officers then walked the detainees up a ramp in the sally port through a set of doors leading to a holding cell in R&D.

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[4] During the period reviewed in our Detainee Report, the MDC housed 2,441 men and 181 women.

In R&D, the detainees were taken one at a time from the holding cell to be fingerprinted, photographed, examined, and then strip searched with restraints removed.[5] They received prison clothes, were once again fully restrained in metal handcuffs attached to a waist chain that was connected to ankle cuffs, and were taken up the elevator to the ninth floor of the MDC.

On the ninth floor, the detainees were taken to the ADMAX SHU, where they were strip searched again and locked in their cells alone or with one other detainee. Detainees remained in their cells at least 23 hours a day. Until late February 2002, the cells were constantly illuminated.

The ADMAX SHU range was shaped like a rectangle, with cells down one side of two long corridors. Four recreation cells separated by chain-link walls and with chain-link, open-air ceilings were located in the middle of the rectangular range. MDC staff members used a multipurpose room located at the end of the ADMAX SHU range for medical examinations, strip searches, and meetings. A room adjacent to the multipurpose room was used as a lieutenant's office.

The ADMAX SHU was separated from the regular SHU by an area containing a holding cell, the SHU lieutenant's office, and a visiting area where attorneys and family members met with the September 11 detainees. These visits occurred in "non-contact" rooms, meaning a

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[5] The BOP technically refers to strip searches as "visual searches," but every MDC staff member we interviewed referred to them as "strip searches."

clear partition precluded any physical contact between parties.

As described in the Detainee Report, the MDC confined the September 11 detainees under highly restrictive conditions. For example, the MDC instituted a four-man hold restraint policy with respect to moving the detainees. This meant that whenever a detainee was taken from his cell, he was escorted by three officers and a lieutenant at all times. During routine escorts on the ADMAX SHU, the detainees also were handcuffed behind their backs and placed in leg restraints. When they were escorted to visits, interviews, or out of the MDC, the detainees were handcuffed in front, restrained in a waist chain, and placed in leg restraints.

On approximately October 5, 2001, as a result of an incident involving a detainee who alleged that he was injured by MDC staff members, the MDC instituted a policy requiring officers to videotape detainees with handheld video cameras whenever they were outside their assigned cells, including when they first arrived at the MDC.[6] As described below, however, we found that staff members did not always adhere to this policy.

### 2. Atmosphere at the MDC Following September 11

As we discussed in the Detainee Report, we recognize that the impact of the terrorist attacks of September 11, 2001, was particularly pronounced for people living or working in the New York City area. Some of the MDC staff members lost relatives, friends, and colleagues in the attacks. Moreover, the staff was working under dif-

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[6] Later in October 2001, the requirement of videotaping all detainee movements became a BOP-wide policy.

ficult conditions on the ADMAX SHU, with many working 12-hour shifts, six or seven days a week, for extended periods of time. In addition, based on the vague label attached to the detainees by the FBI, the MDC staff initially was led to believe that the detainees could be terrorists or that they may have played a role in the September 11 attacks.

Many of the staff members we interviewed described the atmosphere at the MDC immediately after September 11 as emotionally charged. One of the lieutenants currently at the MDC said the staff "had a great deal of anger" after September 11 and that it was a chaotic time at the MDC. Another lieutenant, one of the lieutenants responsible for escorting detainees, stated that upon entering the institution the detainees were handed over to teams of five to seven officers who were "spiked with adrenaline." He said that there were some officers on the escort teams who were "getting ready for battle" and "talking crazy." Another lieutenant responsible for escorting detainees similarly described the officers as "high on adrenaline."

Even though the atmosphere was emotionally charged, none of the current or former staff members we interviewed suggested that the terrorist attacks justified engaging in abusive behavior towards the detainees. To the contrary, nearly all of the MDC staff members we interviewed asserted that they and other staff members always behaved professionally with the detainees.

Yet, as we describe below, these staff members' depictions of their actions were undermined substantially by the consistent allegations of the detainees, the statements of several other MDC staff members, the state-

ments of senior BOP officials, and the videotapes we reviewed.

### 3. The OIG Investigation

In mid-October 2001, the BOP's Office of Internal Affairs (OIA) first referred to the OIG several allegations of physical abuse at the MDC. The OIG's New York Field Office (NYFO) initiated a criminal investigation into allegations that several detainees were slammed against walls by MDC staff members when they first arrived at the MDC. The NYFO interviewed the detainees who made allegations, obtained their medical records, and interviewed several MDC staff members. In conducting this investigation, the NYFO consulted with prosecutors from the Department's Civil Rights Division (CRT) and the United States Attorney's Office (USAO) for the Eastern District of New York.

In addition to the allegations investigated by the NYFO, the detainees made other allegations of physical and verbal abuse against MDC staff members. The CRT assigned some of these additional allegations to the FBI for investigation, and the OIG referred several allegations to the BOP OIA for investigation.

On September 25, 2002, the CRT and the USAO declined criminal prosecution of the MDC staff members who were the focus of the NYFO's investigation. However, even if a matter is declined criminally, the OIG can continue that investigation to determine if there was misconduct that should result in disciplinary or other administrative action. The OIG therefore pursued this investigation as an administrative matter after prosecution was declined.

Other allegations of detainee abuse assigned to the FBI and the BOP OIA also were considered and declined for criminal prosecution. In March 2003, the OIG took over all of the cases that had been referred to the FBI and the BOP OIA and consolidated them into a comprehensive administrative investigation into allegations that some MDC staff members physically and verbally abused some September 11 detainees. This administrative investigation was led by two OIG attorneys, one of whom is a former federal prosecutor in the Public Integrity Section of the Department. This report describes the results of our investigation.

The relevant time period under review was from September 2001 to August 2002, when the detainees were housed in the ADMAX SHU of the MDC. Our review focused solely on complaints at the MDC.

After consolidating approximately 30 detainees' reported allegations against approximately 20 MDC staff members, we sorted the allegations of physical abuse into the following six categories:

1. Slamming detainees against walls;
2. Bending or twisting detainees' arms, hands, wrists, and fingers;
3. Lifting restrained detainees off the ground by their arms, and pulling their arms and handcuffs;
4. Stepping on detainees' leg restraint chains;
5. Using restraints improperly; and
6. Handling detainees in an otherwise rough or inappropriate manner.

The detainees also alleged that MDC staff members verbally abused them by referring to them as "terrorists" and other offensive names; threatened them; cursed at them; and made offensive comments during strip searches.

In the OIG's review of these allegations, we conducted more than 115 interviews of detainees, MDC staff members, and other individuals. The staff members we interviewed primarily were correctional officers and lieutenants who had been assigned to the ADMAX SHU after September 11, 2001, or were involved in escorting the detainees on and off the ADMAX SHU. Almost all of the interviews of the current staff members were administratively compelled, meaning that the employees were required to appear and answer questions.[7] In many cases a union representative, who also was a staff member at the MDC, attended the interview with the employees.

In addition to the correctional officers and lieutenants, we interviewed MDC management officials, internal affairs investigators, and the physician's assistant who was responsible for the detainees' medical needs and evaluations, including examining injuries and monitoring detainees' health during hunger strikes. We also interviewed a senior BOP official who until this year oversaw

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[7] In a compelled interview, Department employees are required to answer questions from the OIG. Compelled interviews normally occur after criminal prosecution of a subject is declined, or if a witness does not voluntarily agree to cooperate. The statements in a compelled interview cannot be used against the person in a criminal proceeding. If an employee refuses to answer the OIG's questions or fails to reply fully and truthfully in an interview, disciplinary action, including dismissal, can be taken against the employee.

correctional operations at the BOP during the relevant period, and a senior BOP official who has been responsible since 2000 for training new BOP officers on restraint and escort techniques.

We also interviewed federal officers, mostly from the former INS, who were involved in transporting the detainees to the MDC. In addition, we interviewed an attorney for one of the detainees who visited his client at the MDC and said that he witnessed abuse.

We reviewed medical records and incident reports for the detainees from the MDC's files. We also reviewed MDC videotapes, including hundreds of tapes showing detainees being moved around the facility, tapes from cameras in the detainees' cells, and several tapes depicting officers using force in specific operations against certain detainees. As will be detailed later in this report, MDC officials repeatedly told the OIG that videotapes of general detainee movements no longer existed. That information was inaccurate. In late August 2003, the OIG discovered more than 300 videotapes at the MDC, primarily spanning the period from early October through November 2001, and we reviewed all of those tapes. While these tapes substantiated many of the detainees' allegations, detainees indicated to us that abuse dropped off precipitously after the video cameras were introduced.

### B. Report Outline

This report is divided into three main sections. First, the report discusses the evidence regarding allegations that the detainees were physically and verbally abused at the MDC. Second, the report describes several issues of concern relating to the systemic treatment of the de-

tainees at the MDC. Finally, the report offers recommendations to address the issues discussed in this report.

In an appendix to this report, we provide to the BOP our findings on specific MDC staff members, current and former, who handled the detainees. That section of the report will not be released publicly because of the privacy interests of those individuals as well as the potential of disciplinary proceedings against them. In the Appendix, we recommend that the BOP consider taking disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about our findings against them. We also recommend that the BOP take appropriate disciplinary action against several unidentified staff members who we observed on videotapes physically abusing detainees or behaving unprofessionally.

## II. PHYSICAL AND VERBAL ABUSE

Our investigation developed evidence that approximately 16 to 20 MDC staff members, a significant number of the officers who had regular contact with the detainees, violated BOP policy by physically or verbally abusing some detainees. For the purposes of this report, we consider "physical abuse" to be the handling of the detainees in ways that physically hurt or injure them without serving any correctional purpose. Under BOP Program Statement (P.S.) 5566.05, improper handling includes instances when staff members use more force than necessary on the detainees or cause the detainees unnecessary physical pain or extreme discomfort. Similarly, we consider "verbal abuse" to be insults, coarse language, and threats to physically harm or inappropri-

ately punish detainees, all of which violate BOP P.S. 3420.09, "Standards of Employee Conduct."

We discuss in this section the general evidence that staff members physically and verbally abused some detainees.

### A. Physical Abuse

#### 1. Slamming, Bouncing, and Ramming Detainees Against Walls

Most of the detainees who made allegations of abuse specifically alleged that MDC staff members slammed them into walls. Several detainees also alleged staff members slammed them into doors and the sides of the elevator that took them up to the ADMAX SHU. According to approximately ten detainees, staff members slammed them against walls on their first day at the MDC while they were in R&D. Detainees also alleged staff members sometimes slammed them into walls in the ADMAX SHU during escorts to and from attorney visits, doctor visits, or recreation, but not as frequently as in R&D. The detainees alleged that these slamming incidents occurred when they were being fully compliant with the officers and were not resisting.

For example, one detainee told us that immediately after he arrived at the MDC, staff members took him out of the van, "slammed" him against a wall, and warned him that they would break his neck if he moved. Another detainee also stated that officers repeatedly "slammed" him against the wall in R&D on the day he arrived. Another detainee stated that on his first day at the MDC, officers painfully "slammed" him back and forth against walls in the ADMAX SHU all the way to his

cell. In addition, another detainee stated that he was "slammed" against the wall in the sally port and that the experience was very painful. In all of these cases, the detainees claimed that they were fully compliant with staff members' instructions.

Detainees said they were slammed into walls much more frequently before the handheld video cameras were introduced in October 2001 than after. One detainee stated staff members told him things like, "If the camera wasn't on I would have bashed your face," and "The camera is your best friend." Detainees also told us that their treatment by the staff at the MDC was worse than their treatment by officers at other institutions. Few made complaints of mistreatment by other officers outside of the MDC.

Our efforts to substantiate or refute allegations that staff members slammed detainees against walls were hindered to some extent because: (1) detainees' escorts were not videotaped until early October 2001, after many of the detainees already had arrived; (2) even after the MDC instituted the policy requiring all detainee escorts be taped, some detainees' escorts were not taped;[8] and (3) a significant number of detainee videotapes were recycled or destroyed, in accordance with a regional policy directive issued in December 2001 that allowed the tapes to be re-used or destroyed after 30 days. These issues

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[8] An officer confirmed to us that not all escorts were recorded. He stated that some movements were not recorded because the officers were unable to find a camcorder. He said that even though seven camcorders were purchased for the ADMAX SHU, over time the camcorders started to disappear.

are discussed more fully below under section III (F), "Obtaining Videotapes from the MDC."

BOP policy prohibits staff members from using more force than necessary on inmates. BOP P.S. 3420.09, "Standards of Employee Conduct," states, "An employee may not use brutality, physical violence, intimidation toward inmates, or use any force beyond that which is reasonably necessary to subdue an inmate." Similarly, BOP P.S. 5566.05, "Use of Force and Application of Restraints on Inmates," authorizes staff members to use force on inmates only as a last alternative after all other reasonable efforts to resolve a situation have failed. It states that even when force is authorized, staff members must not use more force than necessary on the inmates, or cause them unnecessary physical pain or extreme discomfort.[9]

We spoke with two senior BOP officials concerning slamming or bouncing inmates against the wall. One of the officials, who had oversight responsibilities for correctional operations during the relevant time period, stated that unless an inmate is combative or resisting, slamming the inmate into a wall is improper and violates the BOP's policy on "use of force." The other official, who is responsible for training new BOP officers, confirmed that slamming a compliant inmate against the wall is not an appropriate control or escort technique. Both officials

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[9] BOP P.S. 5566.05 provides: When authorized, staff must use only that amount of force necessary to gain control of the inmate; to protect and ensure the safety of inmates, staff, and others; to prevent serious property damage; and to ensure institution security and good order.

stated that slamming, bouncing, and firmly pressing compliant inmates against the wall violates BOP policy.

A former MDC lieutenant, who was one of the lieutenants in charge of escorting the detainees to and from the ADMAX SHU (hereinafter "Lieutenant 1"), corroborated detainees' allegations of slamming. He stated that before the MDC began videotaping all detainee movements, which was on or about October 5, 2001, almost all of the detainees were slammed against walls, particularly in the sally port. He also stated he witnessed staff members "bounce" detainees against the wall. Lieutenant 1 explained that "slamming" a detainee against the wall was when officers shoved the detainee into the wall and held him there, and "bouncing" a detainee off the wall was when officers shoved the detainee into the wall and then quickly pulled him back. Lieutenant 1 said "pressing" a detainee against the wall was when officers used physical force to keep a detainee's chest against the wall.

Lieutenant 1 said he witnessed officers unnecessarily slam, bounce, and forcefully press detainees against the wall. Lieutenant 1 told us that some officers took detainees off transport vehicles and bounced them against the wall every time they could get away with it. Lieutenant 1 asserted the only time it would have been appropriate for an officer to press, bounce, or slam a detainee against the wall was if the detainee was aggressive, combative, or violent. However, Lieutenant 1 said he never saw a detainee act in these ways.

According to Lieutenant 1, he confronted another lieutenant who was responsible for escorting detainees (hereinafter "Lieutenant 2") after seeing Lieutenant 2 slam-

ming detainees against the wall. Lieutenant 2 also supervised many of the officers who Lieutenant 1 witnessed slam detainees against the wall. Lieutenant 1 stated that Lieutenant 2 told him that slamming detainees against the wall was all part of being in jail and not to worry about it.

When interviewed by the OIG, Lieutenant 2 maintained that his officers did not slam detainees against the wall, but he stated that it was possible an officer could have slipped by mistake and slammed a detainee into the wall. He also stated that if the lieutenant supervising an escort was not paying "very, very close attention" and actively controlling the officers while trying to communicate with the detainee, then "anything could have happened."

Moreover, one current MDC officer implied, although did not state, in an affidavit that some staff members bounced detainees off the wall. He wrote, "There were some lieutenants like [Lieutenant 1] who would [rein] in an officer for bouncing a detainee against the wall, but there were probably other lieutenants who would let more slide."

A federal agent who served on the INS's Special Response Team that transported many detainees to the MDC said he witnessed MDC staff members briskly walk compliant detainees into walls without slowing them down before impact. During two escorts we viewed on videotape, we observed officers escort detainees down a hall at a brisk pace and ram them into a wall without slowing down before impact, just as the INS agent described.

Further, an attorney for one detainee said he observed MDC staff members slam his client against the wall. The attorney said that after his visit with his client in February 2002, MDC officers escorted his client out of the visiting room and threw him up against the wall face first. The attorney stated that the officers then removed his client's shoes and banged them against the wall right by his face, clearly intending to intimidate him. According to the attorney, this incident was not recorded by a video camera.

In our review of the videotapes, we saw staff members slam one detainee into two walls while he was being escorted from a recreation cell to a segregation cell. In another incident, we saw staff members forcefully ram a second detainee into two walls while he was being escorted from the recreation deck to a segregation cell. On several videotapes leading up to and following these incidents, we did not observe any conduct that would justify staff members using this amount of force on either of these detainees. Instead, the videotapes show that both men were compliant before and during the escorts when staff members slammed and rammed them against walls.[10]

Many of the detainees also alleged that they were slammed against the wall in the sally port at the bottom of a ramp where a t-shirt was taped to the wall.[11] The

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[10] These incidents are discussed below in detail under "Improper Application and Use of Restraints."

[11] Several officers and two INS agents stated that when the detainees were removed from their transport vehicles, they were pat searched against the wall, right where the t-shirt was located. One officer who worked in R&D said that when staff members pat

t-shirt, which is discussed below in greater detail under "T-Shirt with Flag and Slogan," had a picture of the U.S. flag and the phrase "These colors don't run" on it.

**Image 1: The t-shirt in the sally port.**

Two staff members, Lieutenant 1 and a staff member from R&D, told us they observed blood on the t-shirt. Lieutenant 1 stated some of the bloodstains looked like a couple of bloody noses smudged in a row, and other stains looked like someone with blood in his mouth spit on the t-shirt. None of the current or former staff members we interviewed said they knew how blood got on the t-shirt. Moreover, none of the INS agents who brought the detainees to the MDC recalled any of the detainees being bloody before they arrived at the sally port. While we cannot say definitively whether the blood was from the detainees, the fact that two staff members saw

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searched detainees, they leaned the detainees into the wall and placed their faces on the t-shirt.

blood on the t-shirt where detainees were "placed" provides some evidence that detainees were slammed into the t-shirt, as many alleged.

In addition, our investigation revealed that at least one detainee likely received a bruise on his arm from being slammed into a wall.[12] In his interview, the detainee said his bruise was caused by officers who repeatedly slammed him against the wall in R&D. According to Lieutenant 2, who examined the detainee when he arrived at the MDC, the detainee did not have any bruises when he entered the MDC during the evening of October 3, 2001. However, when the detainee left for court the following day, he had a large bruise on the side of his right upper arm. A videotape of the detainee's bruise showed that it was very dark, circular, and about the size of a tennis ball. Lieutenant 2 said that when he observed the bruise on the detainee's arm the next day, he concluded that the bruise was caused in the MDC, but he did not know how.

The detainee's bruise was examined by an MDC doctor on October 5, 2001, but the detainee's medical records do not indicate what caused his injury. On a videotape of his medical examination that we reviewed, the detainee told the doctor that his bruise "happened here," but the doctor did not ask how he got the bruise and instead said he only wanted to confirm which bruise he was supposed to examine.

The OIG obtained medical records for seven other detainees who alleged MDC staff members slammed

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[12] Two other detainees also maintained they developed bruises after being slammed into the walls.

them against walls. These records do not indicate that the detainees were bruised or otherwise injured from being slammed against the wall.[13] It is possible that the detainees were not injured. However, if they were injured, there are several explanations for why their injuries may not have been recorded in the detainees' medical records. First, some detainees did not seek medical treatment for their bruises because they would have been required to request treatment from the same officers who they alleged injured them. Second, detainees generally received their intake medical assessments shortly after they arrived, before bruises would have developed from being slammed against the wall in R&D. Third, MDC staff members who observed the bruises did not always offer detainees the opportunity to visit medical personnel, as one detainee alleged happened when he showed a lieutenant a bruise he obtained following a "use of force" incident on April 2, 2002. Fourth, some MDC medical personnel may have failed to examine detainees' injuries or discern how they were injured, as shown on the videotape of the medical examination of the detainee who had a bruised arm.

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[13] One detainee alleged his chin was injured by officers who slammed him into a wall, but we did not find sufficient evidence to substantiate this allegation. The detainee obtained a two millimeter long laceration on his chin the day he arrived at the MDC. He alleged that MDC staff members slammed him into the wall while escorting him into R&D. According to staff members who were involved in the escort or who witnessed the incident, the two staff members escorting the detainee tripped over the feet of another staff member who was holding the door open at the top of the sally port ramp. The detainee's medical records indicate that at the time of the examination, he stated that his injury occurred when he "tripped going up."

In our interviews of MDC staff members, most of them denied detainees ever were slammed or bounced against the wall. A few staff members did state that detainees were slammed against the wall, but only when they were noncompliant.[14] Almost all of the staff members we interviewed described the detainees, with the sole exception of Zacarias Moussaoui, as fully compliant and non-combative.

But many of the staff members who told us the detainees never were slammed against the wall or who said that the detainees were slammed against the wall only when they were violent, also told us the detainees never were pressed against the wall, the detainees' heads never touched the wall, or there never was a t-shirt with an American flag on it hanging in the sally port. These claims were contradicted by numerous videotapes showing that staff members routinely pressed detainees into walls, regularly instructed detainees to place their heads against walls, and directed the detainees to face the t-shirt prominently displayed for months in the sally port.

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[14] One lieutenant stated that he observed several detainees not complying when they resisted getting out of transport vehicles, refused to walk up the sally port ramp, or were unresponsive to staff members' commands, such as to lift their arms up during pat searches. This characterization was contradicted by most other witnesses we interviewed.

**Image 2: Officers face detainee towards t-shirt with flag.**

**Image 3: Officers press detainees against walls.**

Furthermore, nearly all of the staff members we interviewed stated that the detainees were compliant, only a few of them were argumentative, and none of them were violent or hostile.[15] For example, a current lieute-

[15] While the detainees were largely compliant, staff members occasionally had to enter a few detainees' cells and use force to prevent detainees from engaging in conduct that violated ADMAX SHU

nant at the MDC said that when the detainees arrived they were scared and visibly afraid. He said it became apparent to him that the detainees were not terrorists.

In addition to alleging that they were slammed against walls, five detainees alleged MDC staff members used force on their heads or necks. For example, one detainee stated that when certain officers pressed him against the wall, they put a lot of pressure on the back of his head and pressed his forehead against the wall. He said whenever he moved his head away from the wall, the officers banged his head on the wall. Similarly, another detainee told us that on the day he arrived at the MDC, one officer grabbed the back of his head in the elevator, pushed his whole face against the elevator wall, and squeezed his head behind his ear as hard as he could. The detainee said, "It was very, very painful."

The two senior BOP officials we interviewed stated that pressing a compliant, non-combative inmate's head or neck against the wall is not an appropriate control technique. The official responsible for training BOP officers said it never was acceptable to touch or use force on an inmate's head or neck unless the inmate was violent and staff members were trying to defend themselves. As noted above, BOP policy prohibits staff members from using more force than necessary to control inmates, or causing them unnecessary physical pain or extreme discomfort. See BOP P.S. 3420.09 and BOP P.S. 5566.05.

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rules, including peeling paint off the walls, injuring themselves, hiding from cameras, or refusing to come to the cell door to be handcuffed.

Lieutenant 1 identified two officers who regularly pressed detainees' heads against the wall. He said one officer put detainees' faces against the wall and screamed at them, and the other officer frequently put his hand on the back of detainees' necks and put their heads on the wall.

When we interviewed the two officers Lieutenant 1 identified, however, both denied ever pressing detainees' heads into the wall or ever witnessing any officer touch a detainee's head or neck. One of the officers commented to us that, "there could be serious damage" if officers put detainees' heads on the wall.

Similarly, nearly all of the other current and former staff members we interviewed maintained they never saw or heard of staff members touching detainees' necks or heads, or pressing detainees' heads against walls. One former officer stated, "we don't put hands on their heads," and another former officer said officers specifically told the detainees not to place their heads against the walls.

However, several videotapes showed officers pressing detainees heads against the wall. One tape showed an officer controlling a detainee by his head and firmly pressing his head and neck against the wall until a lieutenant, noticing the video camera, slapped the officer's hand away. On another videotape, we saw an officer grab a detainee by his hair and his neck, and firmly press his head against a wall. (Image 4) This particular incident was witnessed by one of the officers who told us that he never saw any staff member touch a detainee's neck or head, or press a detainee's head to the wall.

**Image 4: Officers firmly press detainee's head against the wall.**

In sum, we concluded based on videotape evidence, detainees' statements, and staff members who corroborated allegations of abuse, that several MDC staff members slammed and bounced detainees into the walls when they first arrived at the MDC and sometimes in the ADMAX SHU, without justification and contrary to BOP policy. We also concluded that some staff members, contrary to their denials, inappropriately used force on detainees' necks and heads, and pressed their heads against walls.

### 2. Bending Detainees' Arms, Hands, Wrists, and Fingers

Ten detainees alleged that while their hands were cuffed behind their backs, MDC staff members inappropriately twisted or bent their arms, hands, wrists, or fingers during escorts on the ADMAX SHU or to and from R&D, causing them pain. The detainees said staff members bent their arms up into the middle of their

backs, pulled their thumbs back, twisted their fingers and wrists, and bent their wrists forward towards their arms (referred to by MDC staff members as "goose-necking").

As noted above, BOP policy prohibits staff members from using more force than necessary to control an inmate. Similarly, BOP P.S. 5566.05, "Use of Force and Application of Restraints on Inmates," authorizes staff members to use force on inmates only as a last alternative after all other reasonable efforts to resolve a situation have failed. In our interviews with two senior BOP officials, they indicated that twisting or bending hands, wrists, or fingers of compliant inmates is an inappropriate control technique. The BOP official who is responsible for training new BOP officers on restraint and escort techniques stated that staff members should not use pain compliance techniques, such as bending fingers or twisting wrists, unless the inmate is noncompliant or violent and confrontation avoidance through communication has failed. He stated that using pain compliance methods under any other circumstances would be using more force than necessary on an inmate and thus would violate BOP policy.

Two lieutenants and an officer told us that MDC staff members twisted and bent detainees' hands, wrists, and fingers. Lieutenant 1 stated that one officer always twisted detainees' hands during escorts, even when they were being compliant. He said that he had to correct this officer not to hold detainees' fingers or hands "in a manner which causes unnecessary pain." Lieutenant 2 told us he saw officers unnecessarily gooseneck detainees' wrists and said he had to correct them. In addition, an R&D staff member told us he saw officers control de-

tainees by bending their wrists down in "modified gooseneck holds." He stated that these holds were "modified" because the officers were not bending detainees' wrists in order to hurt them, unlike the gooseneck hold. However, he said that the modified gooseneck holds made the detainees uncomfortable and caused some detainees to complain that they were in pain.

Other current and former MDC staff members we interviewed told us different things with respect to whether they or other officers bent detainees' thumbs and goosenecked their wrists. Some said officers never were supposed to hold or bend detainees' thumbs, and they never saw or heard of staff members bending detainees' thumbs or goosenecking their wrists. Others said it was appropriate to bend detainees' thumbs, gooseneck their wrists, or use pain compliance methods if the detainees were being noncompliant or combative, although many of them said the detainees never were noncompliant or combative. One lieutenant told us that it was possible that officers intentionally twisted the injured hand of one detainee who argued with the officers, "just because it's human nature."

Moreover, contrary to some officers' denials that staff members ever bent detainees' hands, wrists, or fingers, in our review of videotapes we observed several instances when MDC staff members bent compliant detainees' arms, hands, wrists, and fingers for no apparent reason. For example, we saw a staff member gratuitously gooseneck a detainee's wrist during a routine escort, even though the detainee was fully cooperative and compliant. (Image 5)

**Image 5: Officer uses thumb to gooseneck compliant detainee's wrist.**

Based on the consistency in the detainees' allegations, witnesses' observations, and videotape evidence, we believe some staff members inappropriately twisted and bent detainees' arms, hands, wrists, and fingers, and caused them unnecessary physical pain, in violation of BOP P.S. 5566.06.

### 3. Lifting Detainees, Pulling Arms, and Pulling Handcuffs

Several detainees alleged that MDC staff members carried them, pulled their handcuffs or waist chains, dragged them, or lifted them off the ground by their restraints and arms. Some detainees also alleged staff members pulled their arms up while their hands were cuffed behind their back, which exerted great pressure on their handcuffs and hurt their wrists. Many of these allegations related to the detainees' first day at the MDC.

For example, one detainee stated staff members dragged him along the ground from R&D to his cell on the ADMAX SHU the day he arrived at the MDC. Similarly, a second detainee alleged MDC staff members pulled him by his arms from R&D to the ADMAX SHU. Furthermore, a third detainee told us that staff members linked their arms through his cuffed elbows to lift him off the ground every time they moved him for the first three days he was at the MDC, even though he was compliant. Another detainee said that staff members lifted him off the floor by his chains and ran with him, even though he was fully restrained and compliant.

According to the senior BOP official responsible for training BOP officers on restraint and escort procedures, it is unnecessary and inappropriate for staff members to lift compliant inmates' restrained arms up behind their backs, even to pat search their lower back area. He also stated that it is not appropriate for staff members to lift or carry inmates if they are compliant and willing to walk on their own. He said using these techniques on compliant inmates violates the BOP's policies because it can cause the inmates unnecessary pain. As noted above, BOP policy prohibits staff members from using physical violence, causing inmates unnecessary physical pain or extreme discomfort, or using any force beyond that which is reasonably necessary to subdue an inmate. See BOP P.S. 3420.09 and 5566.05.

Several MDC staff members and a detainee's attorney told us they witnessed staff members carry detainees, lift detainees, pull detainees' restraint chains, or pull detainees' arms. For example, Lieutenant 1 stated he had to correct an officer for making detainees walk on their toes by lifting their arms or restraints in a painful way. Ano-

ther MDC lieutenant said there were times officers pulled on detainees' handcuffs too much, and he had to slap the officers' hands away. In addition, one detainee's attorney told us that even though his client was in leg restraints, the officers hurried him down the hall so quickly that they nearly were picking him up off the ground when they brought his client to meet with him.

Most current or former MDC staff members we interviewed told us they did not see, hear, or ever recall staff members carrying detainees, lifting detainees, pulling detainees' restraint chains, or pulling detainees' arms to hurt their wrists.

On videotapes of the detainees, however, we observed MDC staff members carry compliant detainees, pull detainees' arms in a way that painfully strained their handcuffed wrists, and forcefully hurry detainees during escorts. For example, we saw staff members in separate incidents quickly move two detainees by carrying them horizontally to the floor, even though there was no indication the detainees refused to walk. We also saw several officers raise compliant detainees' handcuffed arms up behind their backs in a way that bent the detainees' elbows and appeared to hurt the detainees' arms and wrists. (Image 6)

**Image 6: Officers raise compliant detainee's arms up behind his back.**

The senior BOP official responsible for training new officers reviewed some of these instances on the videotapes and stated that the officers' use of these techniques was inappropriate.

We determined from the videotapes and witnesses' statements that some staff members inappropriately carried or lifted detainees, and raised or pulled their arms in painful ways. However, we did not substantiate detainees' allegations that staff members dragged them on the ground, lifted them solely by their chains, or refused to let their feet touch the ground for days.

#### 4. Stepping on Detainees' Chains

Several detainees alleged that MDC staff members purposely stepped on their leg restraint chains while they

were stationary and also while they were walking, injuring their ankles and causing them to fall. According to one detainee, after staff members stepped on his leg restraint chain and caused him to fall, they dragged him by his handcuffs and clothes, stood him up, stepped on his chain again, and repeated the process.

The senior BOP official who trains new BOP officers stated that staff members are never taught to step on inmates' leg restraint chains, even if the inmate is noncompliant, because there is no correctional purpose served in doing so. In his opinion, the only reason officers would step on an inmate's leg restraint chain would be to inflict pain. Again, BOP policy specifically prohibits its staff members from using more force than necessary to control inmates, inflicting unnecessary physical pain on inmates, or causing inmates extreme discomfort.

Lieutenant 2 acknowledged that he observed officers step on detainees' leg restraint chains when they were placed against the wall, although he said he did not like it. He explained that because the detainees' legs were spread apart and the leg restraint chain was taut, the leg restraints could have bruised the detainees' ankles when officers stepped on the chain. Lieutenant 2 said he tried to correct officers when he saw them step on detainees' leg restraint chains.

An R&D staff member also said he saw officers step on detainees' leg restraint chains during pat searches in R&D. According to this staff member, officers stepped on the detainees' leg restraint chains when the detainees first started arriving at the MDC, although they stopped stepping on their leg restraint chains as time passed.

Similarly, an INS agent witnessed MDC staff members step on two detainees' leg restraint chains while firmly holding them against the wall. The agent said the more pressure the officers put on the leg restraint chains, the more the detainees squirmed and complained; and the more the detainees squirmed and complained, the "worse it got" for them.

One MDC correctional officer who assisted with approximately 7 to 10 detainee escorts from R&D to the ADMAX SHU said he observed staff members stepping on detainees' leg restraint chains. The officer incorrectly thought that security procedures required officers to step on detainees' leg restraint chains whenever they were stopped or whenever officers needed to remove their leg restraints. The officer said staff members stepped on detainees' leg restraint chains when they came out of their cells before going to recreation, when officers had to apply or remove leg restraints, or when officers escorting a detainee had to wait for elevators or doors. He stated, however, that he thought the officers only stepped on excess chain that was on the ground and not on chain that was stretched tight between the detainees' legs.

Our investigation found evidence that some detainees had substantial bruises and scabs around their ankles caused by the leg restraints. For example, we reviewed a videotape that showed that by one detainee's second day at the MDC, his ankles were badly bruised.[16]

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[16] An MDC doctor who examined the detainee suggested in the videotapes that his bruises were caused by irritation from the leg restraints and said that he recommended the detainee wear his leg restraints over his socks to prevent further bruising. However, a

Similarly, another detainee's attorney said that he observed significant black and blue bruises on his client's ankles and that his client told him they were caused by staff members who stepped on his leg restraint chains. Based on the statements of MDC staff members, we believe these injuries were the result of staff members stepping on detainees' leg restraint chains, although tight leg restraints that restricted blood flow also may have contributed to bruising around detainees' ankles.[17]

In our interviews, numerous current or former MDC staff members who handled the detainees asserted they never saw or heard of staff members stepping on detainees' leg restraint chains. Several of them, including a senior MDC management official, said it never would be appropriate for staff members to restrain detainees by stepping on their leg restraint chains, unless there was an emergency, because it would have hurt the detainees' legs or caused them to trip.

However, these denials were belied by the statements of other officers, which we described above. Moreover, despite the senior MDC management official's statement that it never was appropriate to step on a detainee's leg restraint chain, we saw a videotape in which he and another staff member appeared to restrain a detainee by stepping on his leg restraint chain during a non-emergency medical examination.[18]

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videotape of the detainee's medical examination showed the detainee already had been wearing the leg restraints over his socks.

[17] We discuss this further under "Improper Application and Use of Restraints" in section 5 below.

[18] In this incident, it appeared that stepping on the detainee's leg restraint chain did not pull on the detainee's ankles and may have

Based on the consistency in the detainees' allegations, eyewitness statements by several staff members, videotape evidence of detainees' ankle injuries, and videotape evidence of the senior MDC management official and another staff member stepping on a detainee's leg restraint chain, we believe some staff members violated BOP policy by stepping on detainees' leg restraint chains. However, the evidence is inconclusive regarding whether MDC staff members stepped on detainees' leg restraint chains while they were walking or repeatedly tripped them and dragged them on the floor, as one detainee alleged.

### 5. Improper Application and Use of Restraints

As described in the June 2003 Detainee Report, the BOP treated all September 11 detainees as "high security" inmates, which meant that they were placed in the ADMAX SHU and subjected to the strictest form of confinement whenever they were taken out of their cells. For example, the detainees were restrained with what the BOP calls "hard restraints:" steel handcuffs, leg restraints, and sometimes waist chains.

Nine detainees alleged that staff members applied handcuffs or leg restraints too tightly, punished the detainees by squeezing their handcuffs tighter, did not loosen restraints after the detainees complained that they were very painful, or left detainees restrained in their

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been intended to ensure that the detainee would not hurt himself or others by bucking his legs. Yet, after reviewing the videotape with us, the senior MDC management official continued to maintain that he did not step on the chain. The other employee on the videotape acknowledged that he believed he and the senior MDC management official stepped on the detainee's leg restraint chain.

cells for long periods of time. For example, one detainee filed a formal complaint against one officer for squeezing his handcuffs tightly during an escort and causing his wrists to bruise. Similarly, another detainee told us that some of the MDC staff members intentionally hurt the detainees by tightening their restraints. This detainee said that if the detainees were "mouthy" or cursed, staff members punished them by applying their restraints tightly. He also said that if a detainee complained that his restraints hurt, the staff members tightened his restraints even more.

While the proper application of restraints may result in some discomfort, the BOP prohibits staff members from using restraints to punish inmates, cause unnecessary physical pain or extreme discomfort with overly tight restraints, or restrict blood circulation in any manner. See BOP P.S. 5566.05 and 3420.09. When staff members apply restraints to inmates in "use of force" incidents, for example, the BOP prohibits staff members from continuing to restrain the inmates after they have gained control of them. See BOP P.S. 5566.05. In addition, the BOP prohibits staff members from applying restraints to an inmate in an administrative detention cell, such as an ADMAX SHU cell, without approval of the Warden or his designee. See BOP P.S. 5566.05.

The senior BOP official who trains new BOP officers stated that all BOP officers are taught how to apply restraints in a way that does not cause pain or restrict blood circulation. However, we observed a few instances on videotapes when medical personnel examining a detainee determined a detainee's restraints were applied too tightly and needed to be loosened. While these videotapes show that staff members applied some de-

tainees' restraints too tightly, we did not substantiate particular detainees' allegations that staff members injured them by tightening their restraints or punished them by applying their restraints too tightly.

However, our investigation developed evidence that staff members punished at least two detainees by leaving them restrained in segregated cells for at least seven hours. According to the senior BOP official responsible for training new officers, inmates can be left in restraints in their cells only so long as they are combative. He stated a lieutenant has to check on the restrained inmates every two hours to determine if they are still physically combative. See BOP P.S. 5566.05. As soon as a lieutenant determines the inmate has regained physical control and is no longer a threat to himself, other inmates, or property, his restraints must be removed. The official said staff members violate BOP policy if they keep inmates restrained longer than necessary, or if they restrain inmates to punish or discipline them. He further stated that if inmates are being disruptive or noncompliant by yelling, it is entirely ineffective to place them in restraints because handcuffing them will not stop them from yelling. He said the only appropriate action would be to move them to another cell where their yelling cannot be disruptive.

On November 8, 2001, two detainees began yelling in their cells and banging on their cell doors in response to screams from a third detainee who was in the medical room having a blood sample taken.[19] On videotapes, we

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[19] The detainee alleged he was screaming in part because one of the officers had bent his thumb back severely while his blood was being taken. While we could not determine by viewing a videotape of the

heard a couple of detainees yelling, "What are you doing to [the third detainee]?" immediately after the third detainee began screaming. We also observed that as soon as these detainees began yelling and banging on their cell doors, a senior MDC management official abruptly turned and walked out of the medical exam room with his deputy following after him. Of the ten staff members in the medical exam room at the time, only the senior MDC management official and his deputy responded immediately to the detainees. Shortly after the senior MDC management official left the medical examination room, we heard a staff member, who sounded like the senior MDC management official, say things to the detainees like, "What do you want?" and "Are you done?"

Subsequently, according to staff members' memoranda and official reports, staff members activated an emergency alarm to request assistance on the ADMAX SHU and performed an "emergency use of force" on the two detainees who had yelled and banged on their cell doors. These memoranda and reports allege that the two detainees were staging a group demonstration and encouraging other detainees to riot and engage in a hunger strike. As part of the "emergency use of force," the two detainees were taken to recreation cells, left there for about half an hour, and then transferred to segregation cells.

In the videotapes of the two detainees initially being escorted from their cells to the recreation deck, we observed that they fully complied with the staff members and that the staff members were not aggressive with

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incident whether this officer had bent the detainee's thumb back, on the videotape it appeared that the officer held the detainee's thumb during part of the medical examination.

them. We saw no "use of force" employed or needed during these escorts from their cells.[20]

While the two detainees were on the recreation deck, we heard staff members discuss the incident off-camera. The staff members never indicated the two detainees were inciting a riot or staging a group demonstration. Instead, one staff member stated to the others that the ADMAX SHU could not house the detainees adequately because there were too many detainees for the staff to handle. Another staff member responded, "Well, things are quiet now. They are not yelling or nothing." Finally a third staff member, who sounded like the senior MDC management official, replied, "Right. We gotta follow up. We've got to leave them in restraints and make them behave—that this is not appropriate."

Shortly after this discussion, we saw on videotapes staff members escorting the two detainees from the recreation deck to segregation cells. These escorts were much more aggressive than the previous escorts to the recreation deck. We saw the officers rush the detainees down the corridors, slam one detainee into walls, ram the second detainee into walls, and hold both of them by their heads or necks. Two lieutenants present during these escorts submitted memoranda alleging that the two detainees were "placed against the wall" because they were uncooperative or resisting staff members. On video-

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[20] According to MDC policy, all "use of force" incidents must be videotaped and the tapes given to the Special Investigative Section (SIS) as evidence to be stored in the SIS evidence safe for two-and-a-half years. However, there were no tapes of these detainees for this date in the SIS safe, according to MDC officials.

tapes of the escorts, however, the two detainees did not appear to be uncooperative or resisting staff members.

The two detainees were then left in hard restraints for more than seven hours in segregation cells.[21] Although staff members submitted memoranda or reports indicating that the officers had handled the two detainees in accordance with BOP policy, the evidence we reviewed indicates that staff members violated BOP policy by using more force than necessary to gain control of the detainees—who appeared compliant—and by leaving them restrained in their cells for an inappropriately long period of time.

Based on our review of the videotapes that were recorded at different locations on the ADMAX SHU, it did not appear that the two detainees were staging a group demonstration, inciting a riot, or doing anything but yelling and banging on their cell doors in response to the screams of the third detainee who was in the medical exam room. While detainees are not permitted to yell, bang on doors, or curse at staff under ADMAX SHU rules, we do not believe the two detainees' behavior in this instance amounted to inciting a riot or required them to be locked in hard restraints in segregation cells for seven hours. Further, the evidence suggests that in this incident, staff members used rough treatment and restraints to punish the two detainees, in violation of BOP policy.

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[21] An official report from the MDC states they were restrained from 2:00 p.m. to 9:10 p.m.

### 6. Rough or Inappropriate Handling of Detainees

Several detainees alleged MDC staff members handled them roughly or inappropriately, asserting that they were punched, kicked, beaten, or otherwise physically abused.

According to the BOP official who trains new BOP officers, officers are not to handle inmates roughly, aggressively, or in any manner that causes them unnecessary pain. He reiterated that using any more force than necessary in handling inmates violates BOP policy.

Several MDC staff members confirmed detainees' allegations that officers used unnecessary force and handled detainees roughly. A current MDC lieutenant who was assigned briefly to the ADMAX SHU stated that a lot of detainees were treated "pretty roughly" when they were brought into the sally port and R&D. Another lieutenant said, "We were not using kid gloves with these guys."

In addition, two former MDC lieutenants and a current lieutenant stated that some officers took their anger and frustration about the September 11 terrorist attacks out on the detainees. They stated they had to tell the officers to "ease up" when handling the detainees, and they had to remove some officers from escort teams because they were too rough with the detainees or were not able to handle them professionally. One of the lieutenants said that some officers "tried to prove that they were men or prove that America was superior" by being unprofessional or overly aggressive with the detainees.

An R&D staff member said he and other R&D staff members had to take officers off escort teams because

they were "rambunctious" and "excited." In addition, the R&D staff member told us officers were unnecessarily rough while pat searching the detainees the first few days they arrived. He commented, "You feel bad if you're roughing up someone who is crying." This staff member also stated that he witnessed officers take off detainees' shoes during pat searches in R&D and knock them against the wall right next to the detainees' faces.

Despite these staff members' statements, many other current and former MDC staff members we interviewed claimed that officers never were aggressive with or used unnecessary force on the detainees. Many also denied that detainees were ever pressed or held to the wall. One lieutenant maintained that the detainees were "treated with kid gloves."

On the videotapes, however, we observed that staff members often handled detainees roughly or inappropriately. For example, we observed that staff members regularly pressed and held detainees to the wall. In addition, we saw one officer sharply slap a detainee on the shoulder and grab another detainee's shoulder and push him. We also saw another officer firmly poke a detainee in the shoulder without any provocation.

One detainee alleged that in late October 2001 staff members punished him twice for talking too much by stripping him, giving him only a sleeveless t-shirt, and locking him in a cell for 24 hours without food or blankets. A second detainee stated he saw officers put the first detainee in cell number 1 with no clothes or blankets, and throw water on the cell floor. The second detainee said that cell number 1 was the punishment cell and the officers kept the first detainee in there all the

time. A third detainee also told us that staff members used cell number 1 to punish detainees.

The first detainee identified three staff members who allegedly punished him by locking him in a cell in a sleeveless t-shirt without food or blankets. When interviewed by the OIG, one of the staff members denied generally that any detainees were mistreated. The other two staff members said the detainee never was placed in a cell without food, although he had been placed on suicide watch once or twice and was stripped, given a suicide watch gown, and put in a different cell so he could be monitored.

However, the detainee's medical records do not indicate that he ever was suicidal or needed to be placed on suicide watch. His file also does not contain any suicide risk assessments or suicide watch records. If the detainee was suicidal, his suicide risk assessment or suicide watch should have been documented, as was done for more than ten other detainees.

We did not receive any videotapes that showed the detainee being placed on or monitored during a suicide watch, even though we received videotapes of other detainees who were placed on suicide watch. However, we observed on videotape an incident in which four staff members, including the two who maintained the detainee had been suicidal, cornered the detainee in a recreation cell while a lieutenant threatened him to stop inciting and talking to other detainees. The lieutenant told him that if he did not do what the staff members said, they would send him to a penitentiary where he would have even less privacy and freedom than at the MDC. The lieutenant said, "You think we can't break you? [The penitentiary]

will." This incident indicates that staff members were irritated with the detainee and lends credibility to the detainee's allegation that some of the same staff members later punished him by locking him in a segregated cell because he talked too much.

While the evidence is not conclusive, it suggests that the detainee was not suicidal and staff members inappropriately and unnecessarily stripped him down to a sleeveless t-shirt and locked him in a segregation cell for 24 hours as a form of punishment.

In addition, videotape evidence and witnesses' statements indicate that some staff members often handled detainees roughly or inappropriately. However, we did not find evidence that staff members punched, kicked, or beat detainees, as some detainees alleged.

**7. Conclusion**

In sum, we concluded, based on videotape evidence, detainees' statements, witnesses' observations, and staff members who corroborated some allegations of abuse, that some MDC staff members slammed and bounced detainees into the walls at the MDC and inappropriately pressed detainees' heads against walls. We also found that some officers inappropriately twisted and bent detainees' arms, hands, wrists, and fingers, and caused them unnecessary physical pain; inappropriately carried or lifted detainees; and raised or pulled detainees' arms in painful ways. In addition, we believe some officers improperly used handcuffs, occasionally stepped on compliant detainees' leg restraint chains, and were needlessly forceful and rough with the detainees—all conduct that violates BOP policy. See BOP P.S. 5566.06.

**B. Verbal Abuse**

Twenty-two detainees alleged that staff members verbally abused them by calling them names, cursing at them, threatening them, or making vulgar or otherwise inappropriate comments during strip searches. For example, detainees alleged staff members called them names like "terrorists," "mother fuckers," "fucking Muslims," and "bin Laden Junior." They also said staff members threatened them by saying things like:

> "Whatever you did at the World Trade Center, we will do to you."
>
> "You're never going to be able to see your family again."
>
> "If you don't obey the rules, I'm going to make your life hell."
>
> "You're never going to leave here."
>
> "You're going to die here just like the people in the World Trade Center died."

Several of the detainees said that when they arrived at the MDC, they were yelled at and told things like:

> "Someone thinks you have something to do with the terrorist attacks, so don't expect to be treated well."
>
> "Don't ask any questions, otherwise you will be dead."
>
> "Put your nose against the wall or we will break your neck."
>
> "If you question us, we will break your neck."
>
> "I'm going to break your face if you breathe or move at all."

One detainee stated that when the detainees prayed in the ADMAX SHU, officers said things like, "Shut the fuck up! Don't pray. Fucking Muslim. You're praying bullshit." Another detainee alleged that when the officers were mistreating the detainees, the officers sometimes said, "Welcome to America."

The BOP P.S. 3420.09, "Standards of Employee Conduct," specifically prohibits verbal abuse of inmates, stating, "An employee may not use . . . intimidation toward inmates," and "[a]n employee may not use profane, obscene, or otherwise abusive language when communicating with inmates. [Employees] shall conduct themselves in a manner which will not be demeaning to inmates."

Nearly all of the staff members we interviewed denied ever verbally abusing the detainees or witnessing any other staff member verbally abuse detainees. Several of them denied ever hearing another staff member even utter a curse word around the detainees. One officer told us that all the staff members were "very polite" with the detainees and that they would ask the detainees, "Can you please do this?" and "Can you please do that?" instead of ordering them around.

However, in our interviews with several current and former staff members, we found evidence that corroborated some of the detainees' allegations of verbal abuse and refuted the officers' denials. For example, one current lieutenant told us that when some detainees requested more food, he heard some officers respond, "You're not getting shit because you killed all those people."

Another current lieutenant told us about one officer who referred to the detainees as "fuckers." In addition,

a staff member from R&D stated that officers cursed around the detainees, and told each other jokes and made derogatory statements about the detainees during strip searches.[22]

One officer acknowledged to us that officers sometimes let their personal feelings get in the way of their professional responsibilities and said things they should not have said. Moreover, a former officer, who maintained that he and fellow officers never verbally abused the detainees, frequently called the detainees "terrorists," "dirtbags," and "scumbags" during one of our interviews of him.

In addition to these current and former staff members, witnesses from outside the MDC also provided some corroboration for the detainees' allegations of verbal abuse. One detainee's attorney said he heard MDC officers constantly refer to the detainee as "the terrorist," "the 9/11 guy," or "the bomber." Similarly, an INS agent told us the detainees were read "the riot act" when they first were brought into the MDC.

We also found evidence on videotapes that suggested officers made inappropriate statements regarding the detainees. For instance, contrary to what many staff members told us, we heard on videotapes staff members curse repeatedly around the detainees. We also saw staff members behave unprofessionally during some strip searches, as the R&D staff member described; on videotapes, staff members laughed, exchanged suggestive

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[22] Strip searches are discussed further below under section III (C), "Strip Searches of Detainees."

looks, and made funny noises before and during strip searches.

We also observed one officer, who was assisting in a routine escort of a detainee, suddenly shout to another staff member in a threatening way, "This guy over here (gesturing to the detainee) thinks by getting nasty with a female officer and disobeying orders, he's going to get shit (legal calls) from you." At this point, the video camera operator admonished the officer to watch what he said on camera. At the end of the escort, the officer leaned over to the detainee and quietly said something that could not be heard on camera.

Similarly, as discussed above, we observed four staff members corner one detainee in a recreation cell. A lieutenant told him that if he did not do what the staff members said, they would send him to a penitentiary where officers would "break" him. This incident is very similar to threats that another detainee alleged a lieutenant made to him. The other detainee told us that a lieutenant against whom he filed a complaint came to his cell and threatened him by saying, "If you guys make too much noise, you're going to the [penitentiary]. And those guys are killers. You won't survive an hour there."

From the statements of several staff members and witnesses outside the MDC and from the videotapes that we reviewed, we concluded that some staff members violated BOP policy by verbally abusing some detainees.

## III. SYSTEMIC ISSUES RELATING TO THE MDC

### A. Issues Addressed in the Detainee Report

The June 2003 Detainee Report described various issues related to the treatment of detainees at the MDC,

including problems with detainees receiving timely access to counsel, detainees being held under extremely harsh conditions of confinement such as cells being lighted 24 hours a day, detainees being held in lockdown for at least 23 hours a day, detainees being placed in full restraints every time they were moved, and detainees not receiving adequate recreational opportunities.[23] Because those issues were discussed in detail in the Detainee Report, we do not repeat them in this report.

In the course of this investigation, however, we found other systemic problems and further information on several issues previously discussed in the Detainee Report regarding the treatment of MDC inmates, which we describe below. These include staff members using a t-shirt taped to the wall in R&D to send detainees an inappropriate message, audio taping detainees' meetings with their attorneys, unnecessarily and inappropriately strip searching detainees, and banging on detainees' cell doors excessively while they were sleeping. In addition, we describe the difficulties we had in obtaining videotapes from the MDC, despite our repeated requests, and our general assessment of the cooperation and credibility of many officers we interviewed.

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[23] Many detainees said they declined to go to the limited recreation because it often was offered only in the early morning when it was cold, and they had only short-sleeve jumpers and no shoes. Some detainees also complained that they were routinely strip searched after recreation, even though they were frisked before and videotaped during their recreation. In reviewing the videotapes, we found that many times the detainees were in the recreation cells before 7:00 a.m. and they appeared to be uncomfortably cold. We also saw videotapes of detainees being kept in restraints during their recreation period.

### B. Video and Audio Taping Detainees' Meetings with Their Attorneys

We found that MDC staff members not only videotaped the detainees' movements when taken from their cells to visit with their attorneys, they also recorded detainees' visits with their attorneys using video cameras set up on tripods outside the attorney visiting rooms. In total, we found more than 40 examples of staff videotaping detainees' attorney visits.[24] On many videotapes, we were able to hear significant portions of what the detainees were telling their attorneys and sometimes what the attorneys were saying as well.

It appeared that detainees' attorney visits were recorded intentionally. On one occasion, an officer instructed the detainee not to speak in Arabic with his attorney because the meeting was being videotaped. In another videotape, a lieutenant told the detainee and his attorney that he had been instructed that they were required to speak in English during the visit. We also observed on several occasions that officers lingered outside the attorney visiting rooms and appeared to be listening to the conversations.

Audio taping inmates' meetings with attorneys is prohibited by federal regulation. Chapter 28 C.F.R. § 543.13(e) provides that "Staff may not subject visits between an attorney and an inmate to auditory supervision." On October 31, 2001, the Attorney General

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[24] Nearly every time we saw a detainee escorted to an attorney visit, his visit was videotaped. While we could hear audio on each of these videotapes, sometimes it was difficult to understand the detainees.

signed a directive that permitted monitoring of attorney-inmate meetings only under limited circumstances when the Attorney General approved the monitoring of the conversations and notice was given to the inmate and the inmate's lawyer. 28 C.F.R. § 501.3(d). According to BOP's Office of General Counsel, this authority was not used at the MDC. In a December 18, 2001, memorandum to wardens in the Northeast Region (which includes the MDC), M.E. Ray, the Regional Director, provided specific guidance on videotaping attorney visits for the detainees: "Visits from attorneys may also be visually recorded, but not voice recorded." No BOP or MDC memorandum specifically authorized taping attorney visits for the September 11 detainees or identified reasons to depart from standard BOP policy or the federal regulation.

When interviewed prior to the OIG obtaining all of the videotapes, MDC Warden Michael Zenk told the OIG that, initially, attorney visits were video and audio taped, but in November 2001, after one of the attorneys complained, the video camera was moved far enough away that the audio of the visits was not recorded.[25] However, as late as February 2002, conversations between detainees and their attorneys are still audible on many of the tapes. When confronted with this information, Warden Zenk stated that the visits should not have been audio taped. He also said his staff thought moving the camera away from the attorney visiting rooms ensured that the visits would not be audio taped.

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[25] Warden Zenk arrived at the MDC in late April of 2002 and provided this information based upon briefings by his staff members.

Recording the detainees' attorney visits also was not necessary for the MDC's security purposes. The attorney visits took place in non-contact rooms separated by thick glass, and the MDC required the detainees to be restrained in handcuffs, leg restraints, and waist chains during the visits.[26] The detainees also were pat searched or strip searched after these meetings.

Taping detainees' attorney visits potentially stifled detainees' open and free communications with legal counsel and discouraged them from making allegations against specific staff members. Nevertheless, in some of the taped conversations, we heard the detainees tell their attorneys detailed allegations about the poor and abusive treatment they had received at the MDC. They described being slammed against the wall, physically abused, verbally abused, and intentionally kept awake at night. Their statements were consistent with what the detainees related to the OIG when they were interviewed months later.

In sum, we concluded that audio taping attorney visits violated the law and interfered with the detainees' effective access to legal counsel.

### C. Strip Searches of Detainees

Upon arriving at the MDC, consistent with MDC and BOP policy, detainees were strip searched in R&D and provided prison clothing. Also in accordance with MDC policy, the detainees were strip searched in R&D when they returned from court appearances or anytime they left the MDC. Very few of the detainees complained

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[26] See the October 18, 2001, official memorandum from a senior MDC management official to all MDC lieutenants.

about the strip searches that occurred in R&D. However, many complained about strip searches that occurred in the ADMAX SHU.

Detainees complained that they were strip searched on the ADMAX SHU for no apparent reason, either minutes after they had been thoroughly searched in R&D and immediately escorted by officers to the ADMAX SHU, or when they had not even left the ADMAX SHU. Several detainees also stated that the staff members performing or observing the strip searches laughed at the detainees during the searches. Detainees complained that the strip searches on the ADMAX SHU often were filmed and that sometimes women were present or in the immediate vicinity during the searches. A few detainees maintained that MDC staff members used strip searches as a form of punishment.

In R&D, the strip searches were conducted in a room that contained detainees' prison clothing. The room had small dividers along the wall that blocked viewing from either side. When regular videotaping of the detainees started in October 2001, the video camera operators turned off the video cameras or filmed detainees only above the waist in R&D.

In contrast, on the ADMAX SHU the strip searches were conducted in either the multipurpose medical examination room, which is completely visible to anyone in the main ADMAX SHU corridor and the recreation cells, or in one of the empty cells on the range. Furthermore, many of the strip searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked. Staff members consistently stated in interviews that filming a strip search in its entirety

was against BOP policy.[27] While on some occasions the filming of the strip search was partially blocked by an officer observing the strip search, this did not appear to be an intentional strategy to give detainees more privacy. In a few videotapes, we heard the officers laughing while observing the strip searches.

It does not appear that the MDC issued written policies regarding when detainees were to be strip searched. According to the detainees and MDC staff, the strip searches on the ADMAX SHU were conducted on the following occasions: (a) always when detainees entered the unit; (b) sometimes when they departed from the unit; (c) often after attorney and social visits on the unit; (d) infrequently after recreation sessions on the unit; and (e) infrequently before medical examinations on the unit.

Staff members informed us that when the detainees arrived on the ADMAX SHU, the detainees had to be strip searched even if they had just been strip searched moments before in R&D.[28] Sometimes the same officers who were present for a detainee's strip search in R&D were present for the detainee's strip search on the ADMAX SHU. Several of the videotapes showed detain-

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[27] BOP officials informed us that there is no national policy specifically prohibiting videotaping inmate strip searches. BOP P.S. 5521.05 provides that the strip search "shall be made in a manner designed to assure as much privacy to the inmate as practicable." However, the very act of filming the entire search seems to run counter to this policy.

[28] However, we found that detainees who were taken off the ADMAX SHU to other locations in the institution, like the health unit or meeting rooms, were not always strip searched when they returned to the ADMAX SHU.

ees' confusion as they futilely tried to explain that they had just been strip searched in R&D.

On the ADMAX SHU, whenever the detainees were outside their cells, they were handcuffed at all times and almost always were placed in leg restraints. As noted above, attorney and social visits were held in no-contact rooms separated by thick glass, detainees were restrained, and the visits were filmed. Nevertheless, detainees often were strip searched after their attorney and social visits. In interviews with the OIG, several officers stated it was standard MDC policy to strip search detainees following attorney or family visits, but they could not point us to any written policy. Yet, even if such searches were consistent with policy, they were applied inconsistently to the detainees and appeared to be unnecessary. Indeed, some staff members told us that the reason attorney and family visiting rooms were on the same floor as the ADMAX SHU was to avoid having to strip search the detainees.

Several detainees alleged that sometimes women were present during strip searches on the ADMAX SHU, which one detainee told the OIG he viewed as an affront to his religious beliefs.[29] During several of the videotaped strip searches, female voices can be heard in the background. In addition, one videotape shows a female staff member walking in the vicinity of a detainee undergoing a strip search.

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[29] BOP policy does not address whether staff members of the opposite gender may be present during strip searches, but BOP P.S. 5521.05 requires that staff of the same gender conduct the strip search unless there are exigent circumstances that are documented.

Some detainees complained that the strip searches were used by the MDC staff as punishment. For example, in one videotape four officers escorted one detainee into a recreation cell and ordered him to strip while they berated him for talking too much with other detainees and for encouraging them to go on a hunger strike. We could see no correctional purpose or justification for strip searching this detainee, who had just been taken from his cell, pat searched, and then escorted into the recreation cell by the four officers.

In sum, we concluded that it was inappropriate for staff members in the ADMAX SHU to routinely film strip searches showing the detainees naked, and that on occasion staff members inappropriately used strip searches to intimidate and punish detainees. We also questioned the need for the number of strip searches, such as after attorney and social visits in non-contact rooms where the detainees were fully restrained and videotaped.

### D. Banging on Cell Doors

Many detainees alleged that officers loudly banged on their cell doors in an attempt to wake them up, interrupt their prayers, or generally harass them.[30] Under MDC and BOP policy, counts were conducted throughout the day and night, including midnight, 3:00 a.m., and 5:00

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[30] Due to the physical characteristics of the metal cell doors and the acoustics on the range, the sound from a light knock on a cell door would reverberate loudly inside and outside the cell. Officers complained to us and to each other on videotapes regarding the loud sounds that came from the detainees banging on the cell doors.

a.m.[31] During these counts, officers were required to see detainees' "human flesh." See BOP P.S. 5500.09. As a result, officers were permitted to wake detainees up at these times if they could not see their skin.[32] According to the officers, during the counts the detainees usually waved their hands from under their blankets, which generally were pulled over their heads to block out the cell lights that were illuminated at all times until at least February 2002.

While several detainees acknowledged to us they understood that the officers were required to conduct periodic counts, these detainees alleged that several officers went beyond what was required for the count by kicking the door hard with their boots, knocking on the door at night much more frequently than required, and making negative comments when knocking on the door.

For example, one detainee claimed that officers kicked the doors non-stop in order to keep the detainees from sleeping. He stated that for the first two or three weeks he was at the MDC, one of the officers walked by about every 15 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to Ameri-

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[31] Counts on the ADMAX SHU were actually double counts. One officer went through the entire range and conducted a count, and then immediately afterwards a second officer conducted an independent second count. At the end, the officers confirmed that they counted the same number of detainees.

[32] BOP P.S. 5500.09 directs staff members to use a flashlight judiciously during nighttime counts, but to use enough light that there is no doubt the staff member is seeing "human flesh." On the ADMAX SHU, however, for months the cells continually were lit by two lights.

ca." Similarly, another detainee stated that when officers kicked the doors to wake the detainees up, they said things like, "Motherfuckers sleeping? Get up!" A third detainee also claimed that a few officers made loud noises at night to keep the detainees awake and that these officers appeared to have fun conducting the counts by knocking on the cell doors. Another detainee said that officers would not let the detainees sleep during the day or night from the time he arrived at the MDC in the beginning of October through mid-November 2001.

One detainee's attorney told us that his client stated that every time he fell asleep the officers came and kicked the doors to wake him up. The attorney told us that the detainee said this was not part of the officers' prescribed counts, but that the officers would watch the in-cell cameras and come kick on the doors as soon as they thought the detainee was asleep.

The officers we interviewed denied that they gratuitously or loudly knocked, kicked, or banged on the detainees' doors. One of the officers stated that for the counts, including the ones in the middle of the night, he knocked on the detainees' cell doors and might have used his foot, but he did not kick the doors very hard. This same officer stated that another officer also used his boot to kick cell doors for counts, but he said that neither he nor the other officer ever used expletives with the detainees or said anything inappropriate or unprofessional. Nevertheless, this officer acknowledged that the detainees experienced "sleep deprivation" from a combination of having cell lights illuminated around the clock and the frequent counts. Another officer confirmed that detainees often were awake for the midnight and 3:00 a.m. counts.

Because the detainees were not moved from their cells during the night, staff members were not required to video record nighttime activities. As a result, none of the videotapes we reviewed showed the ADMAX SHU at night or showed the officers conducting counts at night. Due to the lack of videotape evidence and officers' denials, we were unable to substantiate the detainees' allegations that the officers gratuitously banged on the cell doors or woke up detainees unnecessarily. However, the combination of cells being continuously illuminated and the BOP requirement that officers had to see the detainees' skin during each count in the evenings caused detainees to be awakened regularly and suffer from sleep deprivation.

### E. T-Shirt with Flag and Slogan

As discussed above, many detainees alleged that staff members slammed or pushed them into the wall in the sally port where they were pat searched upon first arriving at the MDC. Numerous detainees recalled that a t-shirt was taped to a wall and that their faces were pressed against the t-shirt. For example, a detainee told us that staff members put his face right in the t-shirt, like he had to "kiss it."

In 11 videotapes we reviewed of a detainee entering the MDC, the staff members placed the detainee's face or head against or right next to the t-shirt while performing a pat search and exchanging the detainee's restraints.[33] The tapes show that the t-shirt was taped to the wall at

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[33] As stated above, even though the MDC instituted a policy beginning in early October 2001 to videotape all movements of detainees, including their escort through R&D, approximately 13 of the more than 300 videotapes that we received showed detainees in R&D.

eye-level near the bottom of the ramp in the sally port, across from where vehicles parked to unload detainees. In large, typed print on the t-shirt below the American flag were the words, "These colors don't run." The t-shirt was taped to the right of a large, red plastic sign reminding law enforcement personnel to lock up their firearms before entering the facility. The t-shirt was noticeable, especially because it seemed clearly out of place against a large block wall that was unadorned, except for the professionally designed plastic sign.

Most officers we interviewed who were involved in escorting detainees through R&D either specifically denied seeing the t-shirt or said they did not recall a t-shirt on the wall in the sally port area. A few officers said they remembered a t-shirt or flag on the wall in the sally port. While several claimed that the t-shirt was innocuous and merely a patriotic gesture, three staff members told us they were troubled by how the t-shirt was being used.

One of the three staff members worked in R&D and remembered that the t-shirt was placed on the wall in mid-September 2001, several days after the detainees began arriving at the MDC. He said that when the detainees were pat searched, officers leaned them into the wall and placed their faces against the t-shirt. The R&D staff member believed the purpose of the t-shirt was to send a message to the detainees. He did not know when the t-shirt was taken down, although he remembered seeing it on the floor once before it was placed again on the wall.

The second staff member, a lieutenant, told us that he was disturbed when he observed officers abusing the t-shirt by using it to "acclimate detainees to the MDC"

and send a message to them. He said that when the detainees were in front of the t-shirt, the officers roughed them up and "manhandled" them more aggressively than necessary. He said he brought his concerns about the t-shirt to the attention of a senior MDC management official, and he thought the t-shirt finally was taken down after he reported it.[34]

The third staff member, also a lieutenant, said he thought the t-shirt was "inappropriate and unprofessional." He claimed that he took the t-shirt down and threw it on the ground on five separate occasions, but staff members kept placing it back up on the wall. The lieutenant said he finally threw it in the trash before mid-November 2001.

We found, however, that in the earliest and latest videotapes that we viewed—in early October 2001 and mid-February 2002—the t-shirt was displayed in the sally port where the detainees entered the institution. We observed the t-shirt on the wall in every video of the sally port during this time period. These videotapes contradict staff members' denials that the t-shirt existed and the lieutenant's claim that he took the t-shirt down five times and finally threw it away before mid-November 2001.

These videotapes further show that the way staff members used the t-shirt leaves little doubt that its placement was intentional. For example, in one videotape a staff member loudly ordered a detainee to, "Look

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[34] The senior MDC management official denied that any lieutenant brought concerns about the t-shirt to his attention until after it was already taken down.

straight ahead!" while he firmly pressed the detainee's upper torso into the wall and the t-shirt so that the detainee's eyes were directly in front of the phrase, "These colors don't run." Several other videotapes also indicate that the officers intentionally placed the detainees against the wall on or near the t-shirt.

Three videotapes of the lieutenant who claimed that he removed the t-shirt from the wall on five separate occasions showed him leading and pressing detainees against the t-shirt when he was searching them. This lieutenant never appeared uncomfortable with the t-shirt or the way in which it was used, as he maintained in his interview with us. For example, in one videotape he ordered a detainee to lift his head up twice until the detainee was looking directly at the flag and the phrase on the t-shirt.

In our view, the way in which the t-shirt was used by staff members was highly unprofessional. See BOP P.S. 3420.09 ("It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally.") We also did not find credible staff members' claims that they lacked knowledge about the t-shirt, especially when we subsequently viewed videotapes showing several of these same officers in front of the t-shirt frisking detainees.

### F. Obtaining Videotapes from the MDC

Shortly after the September 11 attacks, BOP Headquarters sent out a national directive to all regional directors to install video cameras in each September 11

detainee's cell.[35] Some MDC staff members told the OIG that the cameras were installed in the detainees' cells by mid-October 2001, although we learned from other staff members that the cameras were not operating in the cells until February 2002, which is the date on the earliest cell tape the MDC provided us.[36] A senior MDC official confirmed to us that the cell cameras in the ADMAX SHU were not operational until early February 2002.[37] He attributed the delay to logistical and electrical problems.

We determined that the MDC began on October 5, 2001, to videotape the movements of the detainees with handheld camcorders. The impetus for this practice was that a detainee complained to a judge on October 4, 2001, that he had been physically abused by staff members upon entering the MDC the previous day. According to an October 18, 2001, memorandum issued by a senior MDC management official, the purpose of taping detainee movements was to address "serious security concerns." In a memorandum dated October 9, 2001, the BOP Northeast Regional Director instructed all wardens in the region, which included the MDC warden, to vide-

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[35] This policy was communicated by BOP Assistant Director Michael Cooksey to all BOP Regional Directors in a series of video conference calls that occurred between September 13 and September 20, 2001.

[36] When we requested the tapes in July 2003, the MDC had cell tapes for February 17, 2002, 3 days in March, 14 days in April, and every day from May through August 2002 when the last September 11 detainee was transferred out of the ADMAX SHU.

[37] Yet, this MDC official, in a memorandum dated October 5, 2001, certified that the in-cell cameras were installed and operating in 31 cells on the South Tier of the SHU where the detainees were held.

otape any movement of September 11 detainees outside their cells. The memorandum stated that the videotape policy was intended to deter unfounded allegations of abuse by the detainees. The memorandum also directed the wardens to preserve the videotapes indefinitely.

After wardens complained about the difficulties of storing and purchasing vast quantities of videotapes, the policy of preserving the videotapes indefinitely changed when a new regional director, M.E. "Mickey" Ray, issued a memorandum on December 18, 2001, which stated that videotapes had to be retained for only 30 days. After 30 days, videotapes had to be recorded over or incinerated. The only exception was for tapes showing "use of force" incidents and incidents where a detainee alleged abuse; these tapes had to be kept for two years and preserved as evidence in the SIS safe.

During the course of our investigation, we made several requests to MDC officials for videotapes. However, the officials' responses to our requests were inconsistent and inadequate. In response to each of our requests, we obtained additional videotapes that we previously had been told were destroyed or reused.

When the OIG first initiated an investigation of the detainee abuse allegations in October 2001, we requested all tapes for the detainees from the date they first arrived to a date in November 2001. The MDC provided the OIG with 14 tapes and indicated that tapes from other dates had been taped over or destroyed.[38]

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[38] Four of the 14 tapes provided by the MDC either were blank or did not have footage of any of the detainees.

In the spring of 2002, the OIG requested from the MDC all videotapes of the detainees from September 2001 to April 2002. Warden Zenk told the OIG that copying such a large number of tapes would be onerous, that the MDC already had given the OIG all the tapes relating to abuse allegations from detainees, and that the MDC received permission in December 2001 to begin recycling or destroying tapes. Warden Zenk and the OIG staff agreed that the MDC would give the OIG nine days of videotapes that related to allegations of abuse raised by detainees interviewed by the OIG. However, the OIG received tapes for only six days, totaling approximately 45 tapes.

In June 2003, the OIG again specifically requested all the videotapes pertaining to all detainees. In response, the MDC provided us with eight tapes from the SIS safe that had not been provided previously.

In early July 2003, we met with an MDC Special Investigative Agent (SIA) and asked for a further explanation of the MDC's procedure for handling and storing videotapes. The SIA mentioned a storage room, only accessible to the SIS staff, in which he thought there still might be videotapes of the detainees from October and November 2001. We requested that he send us those and any other videotapes of the detainees that we did not already have. After about a month, we still had not received the requested tapes, and we contacted Warden Zenk to ask about the tapes. He referred us to a former SIA who previously had been responsible for the videotapes and had since transferred to the BOP regional office. We asked the former SIA for an inventory of the tapes in the storage room.

Despite frequent prompting, we did not receive an inventory from the MDC until August 13, 2003, approximately five weeks from the time we first asked for the videotapes in the storage room. The inventory was largely unhelpful in that it listed over 2,000 tapes, mostly from April 2002 through August 2002, and it was unclear whether the tapes were from in-cell or handheld cameras. The earliest tapes listed on the inventory were from February 17, 2002.

On August 20, 2003, we visited the MDC to make sense of the inventory and visit the storage room where the tapes were located. The SIA we met with in July escorted us to the storage room that was located in a second building of the MDC. Upon entering the room, we immediately observed a significant number of boxes of videotapes lining much of the wall. The boxes were clearly marked in large handwriting, "Tapes" with dates beginning on October 5, 2001, and continuing to February 2002. These tapes were the only ones omitted from the August 2003 inventory of tapes that had been provided to us by the MDC staff. The SIA said that he did not know why these tapes were not included on the inventory. We took the 308 newly discovered videotapes to review.[39] These 308 tapes provided much of the evidence discussed in this report corroborating many of the

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[39] We also took four tapes from February 17, 2002, that were listed on the MDC's inventory and a tape from April 2, 2002, that was not listed on the inventory. While searching in the room, we noticed that there was no tape from April 2, 2002, the date that a detainee alleged staff members physically abused him during a "use of force" incident. When we asked the SIA where it was, he said that a senior MDC management official had it in his office because he was reviewing it, and the SIA retrieved it from the office for us.

detainees' allegations. Many of the tapes contradicted statements of MDC staff members about the treatment of the detainees.

Discovering such a substantial number of videotapes so late in our investigation also caused a significant delay in our ability to complete this report. Moreover, even with these newly discovered tapes, significant gaps existed in the MDC's production of videotapes. For example, we received less than 15 tapes that depicted the detainees being brought into the MDC, either for the first time or when they returned from court appearances or other meetings.[40] In addition, many tapes start or stop in the middle of detainees' escorts. There also are no tapes from some "use of force" incidents, even though these tapes should have been preserved for two years under BOP policy. MDC officials could not explain these omissions.

As discussed previously, we confirmed many of the detainees' allegations by reviewing the tapes, even though the detainees alleged that the abuse dropped off precipitously after video cameras were introduced. Several detainees said that officers referred to the cameras as the detainees' "best friend." Conversely, the videotapes did not refute any of the detainees' allegations. It is also apparent from our review of several hundred tapes that the officers were cognizant of the presence of the cameras. In one tape, the camera operator reminded an officer

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[40] An MDC officer confirmed to us that not all escorts were recorded. He said that some movements were not recorded because officers were unable to find a camcorder. He said that while seven camcorders initially were purchased for the unit, over time the camcorders disappeared.

who was berating a detainee that the tape was running, which caused the officer to control himself immediately. On another videotape, when an officer was holding the head of a detainee firmly against the wall, a lieutenant appeared to notice the video camera and quickly swatted away the officer's hand from the detainee's head.

We also heard a lieutenant twice order someone to turn the camera off when he was discussing matters with other officers that he apparently did not want videotaped. A few minutes after giving his instruction to turn off the tape and apparently not knowing that the audio was still running, this lieutenant suggested how the officers could break some detainees' hunger strikes: "We'll cure them . . . I want them to stay on a hunger strike. Don't cure anybody; let 'em stay. Let's get a team. Let's go with a tube. The first guy that gets that tube shoved down his throat, they'll be cured!" He then stated, "We're going hard," to which another officer responded, "Outstanding!" The lieutenant repeated his statement, "We're going hard."

Sometimes staff members' remarks caught on the audio portion of the videotape substantiated certain allegations by detainees about conditions in the MDC. For example, detainees complained continually that they were deprived of adequate opportunities to make legal calls. In an off-camera remark, one of the lieutenants can be heard stating that the MDC official responsible for giving the detainees their legal calls often waited to provide legal calls until just before a detainee was scheduled to go to court. This confirmed that the official was not regularly offering detainees legal phone calls as required.

### G. Some Staff Members Lacked Credibility During OIG Interviews

The videotapes also led us to conclude that several officers lacked credibility in their interviews with the OIG. In our interviews, most staff members, particularly ones still employed by the BOP, denied all detainees' allegations of physical and verbal abuse. In many cases, the staff members were adamant that neither they nor anyone else at the MDC engaged in any of the alleged misconduct.

Because of the delay in the MDC's providing us the videotapes, for almost all interviews of MDC staff members we did not have the benefit of the MDC videotapes. Upon viewing them after the interviews, we saw that some staff members engaged in the very conduct they specifically denied in their interviews. This finding caused us to question the credibility of these staff members and their denials in other areas for which we did not have videotape evidence.

For example, three staff members stated in OIG interviews that they did not press compliant detainees against the wall because that would be inappropriate. In viewing videotapes, however, we saw these same officers pressing compliant detainees into walls. In addition, three other staff members denied that they, or anyone else, had bent or twisted detainees' arms, hands, fingers, or thumbs. Again, we observed on videotapes these same staff members twisting compliant detainees' arms, hands, wrists, or thumbs. Another former officer told us he never saw any officer bend detainees' wrists or pull their thumbs, but in one videotape we saw him bend a compliant detainee's fingers in a way that seemed very

painful and did not appear to serve any correctional purpose. Similarly, a lieutenant asserted that he never saw or heard about staff members slamming, pushing, pressing, or firmly placing detainees against the wall, but in a videotape we observed that this lieutenant witnessed staff members forcefully ram a compliant detainee into the wall.[41] In a memorandum he submitted after the incident, the lieutenant described the incident by writing, "The staff placed [the detainee] on the wall until they gained complete control of the inmate and resumed the escort."

Further, another lieutenant claimed to be very disturbed by the t-shirt taped to the wall, but in several videotapes he led detainees right to the t-shirt and exchanged their restraints while officers pressed them against the t-shirt. In another example, an officer adamantly asserted to us that staff members never cursed in front of the detainees. Yet, the videotapes showed several instances when staff cursed in front of this officer and the detainees. In addition, we noted one incident where this officer reminded a colleague that the camera was recording when the colleague cursed about and harassed a detainee.

## IV. OIG RECOMMENDATIONS

We recognize that the MDC faced enormous challenges after the September 11 attacks and that many MDC staff members responded to these challenges by maintaining their professionalism and appropriately performing their duties under difficult and emotional cir-

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[41] This incident is discussed in detail under "Improper Application and Use of Restraints" in section II (A)(5).

cumstances. However, we believe some staff members acted unprofessionally and abusively. In Appendix A, we describe these specific offenses and the evidence relating to them. We believe that appropriate administrative action should be taken against those employees.

In addition, we believe that the BOP and the MDC should review the evidence from our investigation to better prepare for and respond to future emergencies involving detainees, as well as to improve its routine handling of inmates. We therefore offer a series of recommendations to address issues of concern relating to the MDC's treatment of the detainees.

1. During our investigation, we encountered a significant variance of opinion among MDC staff members regarding what restraint and escorting techniques were appropriate for compliant and noncompliant inmates. We recommend that the BOP provide clear, specific guidance for BOP staff members on what restraint and escorting techniques are and are not appropriate. This guidance could take the form of written policy and demonstrations or examples given during training. The guidance should address techniques at issue in this investigation, including placing inmates' faces against the wall, stepping on inmates' leg restraint chains, and using pain compliance methods on inmates' hands and arms.

2. We found that the MDC regularly audio taped detainees' meetings with their attorneys, in violation of 28 C.F.R. § 543.13(e) and BOP policy. We recommend that BOP management take immediate steps to educate its staff on the law prohibiting, except in specific limited circumstances, the

audio monitoring of communications between inmates and their attorneys.

3. While the staff members denied verbally abusing the detainees, we found evidence of staff members making threats to detainees and engaging in conduct that was demeaning to the detainees. We recommend that the BOP and MDC management counsel MDC staff members concerning language that is abusive and inappropriate and remind them of the BOP policy concerning verbal abuse.

4. Because specific officers were not pre-assigned to escort detainees to and from the ADMAX SHU, the lieutenants in charge of escorts used available staff from throughout the institution for the escort teams. Several lieutenants told us that the lack of designated teams contributed to the potential for abuse on escorts. Likewise, while specific staff members were assigned to the ADMAX SHU, we observed on videotapes that staff members from all over the institution, including staff members who had little or no experience handling inmates, were on the ADMAX SHU and had physical contact with the detainees. We recommend that institutions select and train experienced officers to handle high security and sensitive inmates, enforce the policy that a comprehensive log of duty officers and a log for visitors be maintained on the unit, and restrict access to the unit to the assigned staff members, absent exigent circumstances. MDC staff members advised us that officer logs, visitor logs, and restrictions on access to the unit were in place for the ADMAX

SHU, but the videotapes showed that the procedures were not followed.

5. By requiring that all detainees' movements be videotaped and installing cameras in each ADMAX SHU cell, BOP and MDC officials took steps to help deter abuse of September 11 detainees and to refute unfounded allegations of abuse. Once the MDC began videotaping all detainee movements, incidents and allegations of physical and verbal abuse significantly decreased. We therefore recommend that the BOP analyze and consider implementing a policy to videotape movements of sensitive or high-security inmates as soon as they arrive at institutions.

6. We found evidence indicating that many of the strip searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked. The strip searches also did not afford the detainees much privacy, leaving them exposed to female officers who were in the vicinity. In addition, the policy for strip searching detainees on the ADMAX SHU was applied inconsistently, many of the strip searches appeared to be unnecessary, and a few appeared to be intended to punish the detainees. For example, many detainees were strip searched after attorney and social visits, even though these visits were in no-contact rooms separated by thick glass, the detainees were restrained, and the visits were filmed.

   We believe that the BOP should develop a national policy regarding the videotaping of strip searches. We also believe MDC management should provide

inmates with some degree of privacy when conducting these strip searches, to the extent that security is not compromised.

In addition, MDC staff members complained to us and to each other off-camera of inadequate resources on the ADMAX SHU to handle the large number of detainees. Because a strip search involves three or four officers, the BOP should review its policies of requiring strip searches for circumstances where it would be impossible for an inmate to have obtained contraband, such as after no-contact attorney or social visits, unless the specific circumstances warrant suspicion.

7. We found evidence that some MDC medical personnel failed to ask detainees how they were injured or to examine detainees who alleged they were injured. We recommend MDC and BOP management reinforce to health services personnel that they should ask inmates how they were injured, examine inmates' alleged injuries, and record their findings in the medical records.

## V. CONCLUSION

This report details our investigation of allegations of physical and verbal abuse against some detainees at the MDC. It is important to note that these allegations were not against all officers at the MDC, and that most MDC officers performed their duties in a professional manner under difficult circumstances in the aftermath of the September 11 terrorist attacks. After the attacks, the MDC staff worked long hours for extended periods, without detailed information about the detainees' connections to the attacks or to terrorism in general. Moreo-

ver, some MDC staff members lost relatives, friends, and colleagues in the attacks. The atmosphere at the MDC was highly charged and emotional, particularly in the initial period after the attacks.

However, these circumstances do not justify any abuse towards any detainee, as the BOP officers we interviewed readily acknowledged. We concluded that some MDC staff members did abuse some of the detainees. We did not find that the detainees were brutally beaten, but we found evidence that some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time. We determined that the way these MDC officers handled some detainees was in many respects unprofessional, inappropriate, and in violation of BOP policy.

As described in detail in this report, we based our conclusion on a variety of factors. First, the detainees' allegations were specific and, although not identical, largely consistent. In addition, several detainees appeared credible to us when we interviewed them.

Second, the detainees did not make blanket allegations of mistreatment, but distinguished certain MDC officers as abusive and others as professional. Also, the detainees' allegations about their treatment at the MDC contrasted with their description of their treatment at other detention facilities. Most detainees did not have complaints about their treatment at other institutions or by other officers—their allegations of abuse generally were confined to their treatment at the MDC.

Third, several MDC officers provided first-hand corroboration for allegations of mistreatment, including the identities of the offending officers. These officers also made distinctions among officers and practices, lending credence to their testimony.

Fourth, we found unpersuasive the general and blanket denials of mistreatment by many MDC officers who were the subjects of our review. Some officers denied taking actions that we knew occurred based on videotape evidence and other officers' testimony, and other officers we interviewed described some of their actions in terms that lacked credibility. For example, some said that detainees never were pressed against the wall or even touched the wall, which we know to be untrue. Others claimed that officers were extraordinarily polite to the detainees, or that they never heard officers curse in the prison, or that they treated the detainees with "kid gloves." We found many officers lacked credibility and candor regarding their descriptions of what occurred in the MDC, which calls into question their categorical denials of any instances of abuse.

Fifth, videotapes of officers' interactions with detainees, which we were ultimately able to obtain from the MDC after much difficulty, provided support for the detainees' allegations and also undercut the statements of various officers. We were told that the abuse of detainees declined when the officers' actions were being videotaped, which one would expect. Nevertheless, the videotapes showed instances of a detainee being slammed against the wall and detainees being pressed by their heads or necks, despite officers' denials that this ever occurred and despite statements by senior BOP officials that such actions were not appropriate. Also, contrary

to statements made by several officers in their interviews with the OIG, we heard officers on the videotapes using curses in front of the detainees and making derogatory statements about detainees off-camera. The videotapes also confirm that officers placed detainees against an American flag t-shirt in the sally port, which was taped to the wall in the same place for many months, despite officers' denials of the existence of such a t-shirt or claims that it was removed after a short time.

Moreover, the videotapes showed that some MDC staff members misused strip searches and restraints to punish detainees and that officers improperly and illegally recorded detainees' meetings with their attorneys.

In sum, we believe that the evidence developed in our investigation shows physical and verbal abuse of some detainees by some MDC staff members. We believe that the BOP should take administrative action against those employees who committed these abuses. Further, we believe the BOP should take steps to prevent these types of abuse from occurring in the future, including implementing the recommendations we made in this report. We therefore are providing this report to the BOP for appropriate action.

AND
BRIEFS

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 15-1358

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR, PETITIONER,

v.

AHMER IQBAL ABBASI, *ET AL.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF OF PETITIONER JAMES W. ZIGLAR

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## QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit, in finding that respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown Named Agents Of The Federal Bureau Of Narcotics*, 403 U.S. 388 (1971), err by defining "context" at too high a level of generality where respondents challenge the policy decisions taken in the immediate aftermath of the attacks of September 11, 2001, by petitioner James W. Ziglar, then the Commissioner of the United States Immigration And Naturalization Service, the then-Attorney General of the United States, and the then-Director of the Federal Bureau of Investigation regarding the conditions of confinement of persons illegally in the United States whom the FBI had lawfully arrested and detained in connection with its investigation of the September 11 attacks, each of whom came from the same part of the world as, and shared ethnic and religious affiliations with, the September 11 attackers (many of whom themselves were illegally in the United States), thereby implicating concerns regarding national security, immigration, and the separation of powers that strongly counsel against judicial creation of such a remedy?

2. Did the court of appeals, in denying qualified immunity to petitioner Ziglar for his official actions in the immediate aftermath of the attacks of September 11, 2001, err: (A) by defining "established law" at too high a level of generality, thereby failing to recognize that clearly-established law did not make it apparent to all but the plainly incompetent

or those who knowingly violate the law that Mr. Ziglar's specific conduct violated the rights of those detainees in the specific context of this case; and (B) by finding that even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like petitioner Ziglar was not clearly established at the time in question, respondents nevertheless could maintain a § 1985(3) claim against Mr. Ziglar so long as his conduct violated some other clearly established law?

3. Did the court of appeals err in finding that respondents' Fourth Amended Complaint meets the pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), because that complaint relies on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with petitioner Ziglar's liability, but which are also consistent with the conclusion that Mr. Ziglar acted with a non-punitive and nondiscriminatory intent to detain in restrictive confinement aliens who were illegally in the United States and who had potential connections to those who had committed terrorist acts, thereby rendering respondents' claims implausible under *Iqbal*?

## PARTIES TO THE PROCEEDINGS BELOW

Petitioner in No. 15-1358, James W. Ziglar, was a defendant in the United States District Court for the Eastern District of New York, and a cross-appellee in the United States Court of Appeals for the Second Circuit.

Petitioners in No. 15-1359, John Ashcroft and Robert Mueller, were defendants in the district court and cross-appellees in the court of appeals.

Petitioners in No. 15-1363, Dennis Hasty and James Sherman, were defendants in the district court and appellants in the court of appeals.

Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the district court, and appellees-cross-appellants in the court of appeals. They comprise the respondents in this Court.

Ibrahim Turkmen and Akhil Sachdeva were also plaintiffs in the district court and appellees-cross-appellants in the court of appeals. The court of appeals affirmed the district court's dismissal of their claims. Appendix to Petition for Writ of Certiorari, No. 15-1358, at 72a, 81a & 83a. Neither Mr. Turkmen nor Mr. Sachdeva filed a petition for a writ of certiorari to review that aspect of the judgment of the court of appeals. Respondents' Brief in Opposition to the petitions in Nos. 15-1358, 15-1359 & 15-1363, at 36 n.15.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the district court, but none of them participated in the appeals relevant to these consolidated cases in this Court.

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the district court, but none of them participated in the appeals relevant to these consolidated cases in this Court.

Michael Zenk was a defendant in the district court and an appellant in the court of appeals.

Salvatore Lopresti was a defendant in the district court. He filed a notice of appeal from the judgment of the district court, but when he failed to pay the requisite fee or file a brief in the court of appeals, that court dismissed his appeal pursuant to Fed. Rule App. Pro. 31(c).

Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the district court, but none of them participated in the appeals relevant to these consolidated cases in this Court.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Turkmen v. Hasty*, 789 F.3d 218 (C.A. 2 2015) (Pooler & Wesley, JJ.) (Raggi, J., concurring in the judgment in part and dissenting in part). App. to Pet. for Cert. 1a-156a. The order of the court of appeals denying rehearing and rehearing en banc is reported at *Turkmen v. Hasty*, 808 F.3d 197 (C.A. 2 2015) (Katzmann, C.J., not participating) (Pooler & Wesley, JJ., concurring)
(Jacobs, Cabranes, Raggi, Hall, Livingston & Droney, JJ., dissenting). App. to Pet. for Cert. 227a-240a.

The opinion of the United States District Court for the Eastern District of New York is reported at *Turkmen v. Ashcroft*, 915 F.Supp.2d 314 (E.D.N.Y. 2013) (Gleeson, J.). App. to Pet. for Cert. 157a-226a.

## JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Second Circuit issued its opinion and judgment June 17, 2015. App. to Pet. for Cert. at 1a-2a. On December 11, 2015, the court of appeals denied Mr. Ziglar's timely petition for rehearing or rehearing en banc. *Id.* at 227a. On February 26, 2016, Justice Ginsburg in her capacity as Circuit Justice for the United States Court of Appeals for the Second Circuit extended the time for Mr. Ziglar to file his Petition For A Writ Of Certiorari to April 11,

2016. On April 4, 2016, Circuit Justice Ginsburg granted Mr. Ziglar's second motion to extend time, extending the time for Mr. Ziglar to file his Petition to May 9, 2016. Mr. Ziglar timely filed his Petition that day.

This Court granted Mr. Ziglar's Petition For A Writ Of Certiorari October 11, 2016. ___ U.S. ___ (2016), No. 15-1358, 2016 WL 2626263 (Mem.) (Sotomayor & Kagan, JJ., not participating). That same day, this Court granted petitions for writs of certiorari in two related cases and consolidated the three cases for disposition by this Court. *Ashcroft v. Turkmen*, ___ U.S. ___ (2016), No. 15-1359, 2016 WL 2653655 (Mem.) (Sotomayor & Kagan, JJ., not participating); *Hasty v. Turkmen*, ___ U.S. ___ (2016), No. 15-1363, 2016 WL 2653797, (Mem.) (Sotomayor & Kagan, JJ., not participating).

Upon the request of petitioners and respondents in these consolidated cases, the Court amended the caption in each of the three consolidated cases to substitute respondent Ahmer Iqbal Abbasi as the first-named respondent in place of the previously first-named respondent, Ibrahim Turkmen. Mr. Turkmen did not seek review in this Court of the court of appeals' judgment affirming the district court's dismissal of his claims, and so is not a party to these consolidated cases.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the Appendix To Petition For Writ Of Certiorari filed by Mr. Ziglar in No. 15-1358, at 241a-243a.

## STATEMENT OF THE CASE

Petitioner in No. 15-1358, James W. Ziglar, adopts by reference and incorporates herein the Statement of the Case set forth in the Brief for Petitioners Ashcroft and Mueller in No. 15-1359 and in the Brief for Petitioners Hasty and Sherman in No. 15-1363. In addition, he respectfully calls the Court's attention to the following.

Mr. Ziglar held the office of Commissioner of the United States Immigration And Naturalization Service ("INS") when terrorists struck the World Trade Center and other targets September 11, 2001. App. to Pet. for Cert. at 3a. Mr. Ziglar served as INS Commissioner throughout the months immediately following those attacks, the time period relevant to this case and one of the most extraordinary periods in our nation's history.

At that time, INS was a component of the Department of Justice. *Id.* at 6a-7a. Mr. Ziglar thus served under then-Attorney General John Ashcroft and with then-Director of the Federal Bureau of Investigation Robert Mueller in formulating the response to these unprecedented attacks on American citizens on American soil.

The perpetrators of these attacks comprised persons who were not U.S. citizens, a number of whom were not legally present in the United States, all of whom came from countries in the Middle East, and all of whom shared the same ethnic background (Arab) and same religious affiliation (Muslim).

Respondents, plaintiffs below, comprise six persons who on 9/11 also were not U.S. citizens, none of whom were legally present in the United States, all of whom came from countries in the Middle East, and all of whom shared the same ethnic background (Arab) and same religious affiliation (Muslim) with the 9/11 attackers.

During the 9/11 investigation, the United States arrested respondents for immigration violations and detained them for a period of time. *Id.* at 7a-9a. In the pleading now at issue in this Court, the Fourth Amended Complaint ("FAC"), respondents have on behalf of themselves and a class of similarly-situated persons asserted claims arising from the conditions of their detention, alleging constitutional torts and seeking money damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and under 42 U.S.C. § 1985(3). Their FAC names as defendants Mr. Ziglar, petitioner in No. 15-1358, and petitioners in No. 15-1359, Mr. Ashcroft and Mr. Mueller (the "DOJ Defendants"), as well as petitioners in No. 15-1363, Dennis Hasty and James Sherman, employees of the Bureau of Prisons ("BOP") who worked at the Metropolitan Detention Center ("MDC") in New York

City where the government detained respondents. App. to Pet. for Cert. at 9a-10a.

A group of plaintiffs originally instituted this case in 2002 in the United States District Court for the Eastern District of New York. *Id.* at 172a. The case went through various iterations until, in 2009, the court of appeals remanded it for the district court to evaluate plaintiffs' claims under this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Turkmen v. Ashcroft*, 589 F.3d 542 (C.A.2 2009). On remand, two of the original plaintiffs (the others having settled) joined by six new plaintiffs filed the FAC, the pleading at issue in the matter now before this Court. App. to Pet. for Cert. at 5a.[1]

Claims One to Five and Seven of the FAC named the DOJ Defendants and five MDC Defendants, while Claim Six named only the MDC Defendants.[2] Insofar as it concerns the DOJ Defend-

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[1] As noted above, only six of those eight plaintiffs appear as respondents in this Court. The opinions below set out the lengthy procedural history of this case. App. to Pet. for Cert. at 4a-6a & 172a-175a.

[2] Respondents did not appeal to the court of appeals the district court's dismissal of Claims Four and Five. App. to Pet. for Cert. at 20a n.13. The court of appeals affirmed the district court's dismissal of Claim Three of the FAC as to the DOJ Defendants, and reversed the district court's refusal to dismiss that claim as to the BOP defendants. *Id.* at 27a. Respondents have not (continued...)

ants, only three of those claims remain at issue: Claim One, which alleged that the punitive conditions of respondents' confinement violated their Fifth Amendment substantive due process rights; Claim Two, which alleged that respondents were held in restrictive confinement because of their race, ethnicity, or national origin, in violation of their Fifth Amendment equal protection rights; and Claim Seven, which alleged a conspiracy among all the defendants to deprive respondents of their equal protection rights pursuant to 42 U.S.C. § 1985(3). *Id.* at 5a-6a.

Respondents rested each of these claims on their allegation that the alleged punitive conditions of confinement that the defendants imposed on respondents were unlawful because Mr. Ziglar and the other defendants lacked "information connecting [respondents] and class members to terrorism or raising a concern that they might pose a danger to the facility." *Id.* at 272.

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(...continued)

sought review of that aspect of the court of appeals' judgment in this Court. Though, as noted, Claim Six did not name the DOJ Defendants, the district court held that "the factual allegations incorporated by reference into Claim One embrace the strip search allegations" of Claim Six, and therefore "deem[ed] Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants." *Id.* at 184a n.9.

Specifically, respondents alleged that the FBI designated each of them as "of interest" or "of high interest" to its 9/11 investigation. *Id.* at 67a-68a. This classification, respondents claimed, meant that pursuant to its policy BOP placed them in "the most restrictive and secure conditions permitted." *Id.* at 49a. They alleged that pursuant to the FBI's "hold until cleared" policy, because of this classification none of them could be released, or placed in less-restrictive confinement, unless and until the FBI's 9/11 investigation concluded that they had no ties to terrorism. *E.g.*, *id.* at 8a.

The FAC alleged that the DOJ Defendants received "detailed daily reports regarding arrests and detentions, *id.* at 35a-36a, and "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' " to the 9/11 investigation. *Id.* at 36a (internal quotation marks omitted). It further alleged that Ashcroft ordered that all persons on a list that the FBI's New York City office had compiled (the "New York List") be treated as "of interest" and held until cleared, "despite a complete lack of any information or a statement of FBI interest" in these persons. *Id.* at 38a. Without citation to any facts, the FAC attributed to Mr. Ziglar (as well as to Mr. Mueller), Mr. Ashcroft's decision to hold the persons on the New York FBI list until cleared. Again, without citation to facts, it then alleged that Mr. Ziglar's "decision" in this regard rested on his "discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist

attacks, or at least to have relevant information." *Id.* at 196a n.17 (quotation marks omitted). Respondents similarly alleged that Mr. Ziglar and Mr. Mueller shared this "discriminatory notion." *Ibid.*

Respondents incorporated into the FAC two reports prepared by the DOJ Office of Inspector General ("OIG") stating the results of its investigation into the conditions at MDC and the federal law enforcement response to 9/11 ("OIG Reports"). Respondents attempted to limit this incorporation by stating they were incorporating the OIG Reports "except where contradicted by the allegations" of the FAC, but did not specify what those contradictions might be. *Id.* at 246a n.1 & 247a-248a n.2.[3]

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[3] "There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. See U.S. Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003) (the 'OIG Report'), available at http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC. See U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the 'Supplemental OIG Report'), available at http://www.justice.gov/oig/special/0312/final.pdf." App. to Pet. (continued...)

Mr. Ziglar, Mr. Ashcroft, and Mr. Mueller moved in the district court to dismiss the FAC for failure to state claims upon which relief can be granted, as did the MDC Defendants. The district court decided all the motions in its January 15, 2013, Memorandum & Order. *Id.* at 157a-226a. It first held that Claim One did "not plausibly plead that the DOJ defendants possessed punitive intent," an element of the respondents' substantive due process claim. *Id.* at 189a-191a. As to Claim Two, which alleged that the DOJ defendants "created and implemented the harsh confinement policy because of [respondents'] race, religion, and national origin," *id.* at 194a, the district court found that the FAC's averments, viewed together under the *Iqbal* standard, did "not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a.

The district court observed that in *Iqbal*, this Court had found that the policy of holding high interest detainees until cleared in and of itself did not suggest discriminatory animus, and that, similarly, the fact that this policy disparately

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(...continued)

for Cert. 6a n.5. The first OIG Report appears at J.A. 34-335; the Supplemental Report appears at J.A. 336-416.

affected Muslims and Arabs did not so do, either. The district court conceded that respondents had "amplified their claim" in this regard by alleging that the DOJ Defendants knew that the FBI lacked information tying detainees to terrorism, and by alleging that non-Arab and non-Muslim detainees "were cleared quickly or moved into the general population without clearance." *Id.* at 199a-200a. But viewing the FAC as a whole, the district court said, it could not find these inferences sufficient to meet *Iqbal's* pleading requirements. *Id.* at 200.

The district court accordingly dismissed both Claims One and Two as to the DOJ Defendants, without reaching the issue of qualified immunity. *Id.* at 225a. It also dismissed Claim Three, respondents' free exercise claim, finding that it "fails to plausibly plead that the DOJ defendants intended to burden [respondents'] free exercise" rights. *Id.* at 219a. Finally, it dismissed Claim Seven, § 1985(3) conspiracy, because as to the DOJ Defendants, none of the underlying objects of the conspiracy had "survived the motion." *Id.* at 226a.

The court of appeals consolidated various appeals and cross-appeals from the district court's judgment. On June 17, 2013, a divided panel issued its opinion affirming in part and reversing in part (Pooler & Wesley, JJ.), *id.* at 2a-83a, over a lengthy opinion by Judge Raggi concurring in part in the judgment and dissenting in part. *Id.* at 83a-156a. The panel majority reversed the district court's dismissal of Claims One and Two, finding a *Bivens*

remedy to be appropriate in the circumstances and concluding that the FAC had plausibly alleged that the DOJ Defendants had acted with punitive and discriminatory intent.

The panel majority based its conclusion on a theory that respondents themselves had never advanced in the thirteen years of litigation of this matter, the so-called "lists-merger theory." *Id.* at 32a n.21. The panel majority posited that the FAC plausibly pleaded that Mr. Ziglar, along with Mr. Ashcroft and Mr. Mueller, knew that DOJ was detaining illegal aliens in punitive conditions of confinement even though there existed no suggestion that these detainees had any ties to terrorism, "except for the fact they were, or were perceived to be, Arab or Muslim." *Id.* at 31a. The panel majority found that the FAC plausibly alleged that the DOJ Defendants, while aware of respondents' status, "were responsible for a decision to merge" the New York List the FBI had compiled with a national list of detainees that INS had created. *Ibid.* The court stated that the INS national list "contained the names of detainees whose detention was dependent not only on their illegal immigration status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities." *Ibid.* By contrast, the court of appeals continued, the FBI's New York List contained the names of detainees whom the New York FBI had not yet determined "had any connection with terrorist activity." *Id.* at 18a. The panel majority concluded the "merger ensured that" respondents–who were on

the New York List–"would continue to be confined in punitive conditions" even without any determination that they had any ties to terrorism, thereby stating a Fifth Amendment due process claim. *Id.* at 31a-32a.

The panel majority concluded that the FAC plausibly pleaded that it was Ashcroft who had made the decision to merge the lists in early November 2001, with knowledge that it would result in the confinement in the harshest possible conditions of persons the FBI had not linked to terrorism. *Id.* at 39a. It concluded also that the FAC plausibly pleaded that "Mueller and Ziglar complied with Ashcroft's [merger] order notwithstanding their knowledge that the government had no evidence linking [respondents] to terrorist activity." *Id.* at 46a. The panel majority held: "In this instance, [respondents] plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." *Id.* at 42a. The court of appeals accordingly permitted respondents' substantive due process claim, Claim One, to proceed, subject to the limitation that liability could be found only after the decision to merge the lists, which had occurred November 2, 2016. *Id.* at 46a.

For the same reasons, the panel majority held that the FAC had plausibly alleged that the FBI had compiled a list "not based on individualized suspicion, but rather based on race, ethnicity,

religion, and/or national origin," and that with knowledge of this, the DOJ Defendants "condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subject to the challenged conditions of confinement." *Id.* at 59a.

The panel majority found that the FAC had plausibly pleaded that the DOJ Defendants had engaged in a conspiracy under 42 U.S.C. § 1985(3) to deprive respondents "of the equal protection of the laws" due to the DOJ Defendants' "racial" or "class-based invidiously discriminatory animus." *Id.* at 77a-78a (citations and internal quotation marks omitted). The panel majority also found that the FAC had plausibly pleaded a tacit conspiracy among the DOJ Defendants and defendants Hasty and Sherman "to effectuate the harsh conditions of confinement with discriminatory intent." *Id.* at 78a.[4]

The panel majority conceded that the applicability of § 1985(3) to federal officials was an open question, but said that so long as the alleged

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[4] The panel majority rejected the argument of the MDC Defendants that the intracorporate conspiracy doctrine barred respondents' § 1985(3) conspiracy claim, App. to Pet. for Cert. at 79a-80a, finding it could not conclude at that stage of the case that the various defendants "acted as members of a single policymaking entity for purposes of [that] claim." *Id.* at 80a.

conspiracy violated some other established law, the defendants were not entitled to qualified immunity on that claim. App. to Pet. for Cert. at 81a.[5]

As to Mr. Ziglar, Mr. Ashcroft, and Mr. Mueller, then, the panel majority accordingly reversed the district court's dismissal of respondents' two conditions-of-confinement claims (Claim One, substantive due process, and Claim Two, equal protection), as well as the conspiracy claim (Claim Seven). It affirmed the district court's dismissal of Claim Three, free exercise, as to the DOJ Defendants. *Id.* at 83a.

Judge Raggi filed a lengthy opinion concurring in the judgment in part and dissenting in part. *Id.* at 83a-156a. After concluding that the case arose in a new context and that special factors militated against judicial implication of a remedy under *Bivens*, she carefully analyzed the factual averments of the FAC to test whether they met *Iqbal's* pleading standards.

With regard to respondents' punitive confinement claim, her detailed review of the FAC led

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[5] The panel majority refused to extend qualified immunity to the DOJ Defendants (an issue the district court had not been required to reach given its disposition of the case) on the ground that the law at issue, to be free from punitive confinement and discriminatory treatment, had been clearly established as of the dates at issue. App. to Pet. for Cert. at 47a-48a, 71a-72a & 80a-81a

her to several conclusions. First, she found that the FAC failed "to plead a sufficient factual basis for ascribing the merger decision to" Mr. Ziglar or any of the other two DOJ Defendants. *Id.* at 119a; *id.* at 119a-125a. Second, she concluded that even if the FAC could be read as pleading such a factual basis, respondents still had failed "to plead that" Mr. Ziglar or the other DOJ Defendants "thereby intended for [respondents] to be held in the MDC's ADMAX SHU." *Id.* at 125a; *id.* at 125a-126a. Third, Judge Raggi found that respondents had not even alleged that Mr. Ziglar and the other two DOJ Defendants " 'were even aware' of the challenged restrictive confinement conditions at the MDC." *Id.* at 126a (quoting *Turkmen v. Ashcroft, supra,* 915 F.Supp.2d at 340); *id.* at 126a-129a. Fourth, she found that the FAC failed to plead that Mr. Ziglar or the other DOJ Defendants had agreed to the merger of the lists "because of, not merely in spite of the action's adverse effects," as *Iqbal* required. *Id.* at 130a (internal quotation marks omitted). Finally, she found that respondents had failed "plausibly to allege facts admitting an inference that their continued MDC restrictive confinement after November 2001 was 'arbitrary or purposeless' to any legitimate objective, so that [Mr. Ziglar's and the DOJ Defendants'] real intent must have been punitive." *Id.* at 130a (quoting *Bell v. Wolfish,* 411 U.S. 520, 539 (1979)); *id.* at 130a-139a. She concluded:

> "That inference is, I submit, foreclosed by the 'obvious' and 'more likely' explanation for the challenged action:

> the DOJ Defendants' determination to identify and apprehend anyone involved in the 9/11 attacks and to safeguard the nation from further terrorist attacks." *Id.* at 130a.

With regard to respondents' claim of discriminatory confinement, Judge Raggi again closely analyzed the FAC to conclude that it also failed plausibly to plead such a claim. She first found the FAC's averments on these issues "not materially different from those considered" by this Court in *Iqbal*, and therefore inadequate to plead a claim of discriminatory intent. *Id.* at 144a-145a. Second, for the reasons she had identified with regard to respondents' substantive due process claim, she found the FAC failed to plead sufficient facts to make out a claim of discriminatory intent. She added that the inference of such intent was weakened by the fact the lists-merger decision applied not only to MDC detainees, but also to those detainees housed at the Passaic, New Jersey facility, which included the majority of those on the New York List, who were not subject to harsh conditions of confinement "even though they shared the same racial, religious, and national identities as" respondents. *Id.* at 146a; *id.* at 146a-148a. Third, Judge Raggi's opinion concluded that *Iqbal* had already held that a claim of discriminatory intent based on a lack of individualized suspicion failed to plead a claim for relief where, in the aftermath of the 9/11 terrorist attacks, pressing considerations of national security constituted a plausible alternative

explanation for the challenged detention. *Id.* at 148a-149a.

Mr. Ziglar filed a timely petition for rehearing and rehearing en banc, as did Mr. Ashcroft and Mr. Mueller. The court of appeals denied those petitions on a 6-6 vote (Chief Judge Katzmann not participating). *Id.* at 227a-229a. The panel majority filed a brief concurrence, *id.* at 229a-231a, while the six en banc dissenters filed a longer opinion. With regard to the *Iqbal* issue, the en banc dissent noted that "the majority's identification of viable claims, particularly policy-challenging claims against the Attorney General and FBI Director, frequently relies only on hypothesized possibilities, or on conclusory assumptions or insinuations of discriminatory purpose that the Supreme Court has already rejected" in *Iqbal*. *Id.* at 238a (footnote omitted). *See id.* at 239a n.16 (analysis applies to Mr. Ziglar as well).

## SUMMARY OF ARGUMENT

1. In holding that respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown Named Agents Of The Federal Bureau Of Narcotics*, 403 U.S. 388 (1971), the court of appeals departed from settled precedent of this Court and the decisions of other federal courts of appeals. It did so by myopically focusing only on the rights injured and the mechanism of injury, which led it to define the context of the case as "federal detainee Plaintiffs,

housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions"—a far too generalized definition of context. *Id.* at 24a.

Respondents challenge the actions taken in the context of the immediate aftermath of the attacks of September 11, 2001, by petitioner Ziglar, then the Commissioner of the INS, the then-Attorney General of the United States and the then-Director of the Federal Bureau of Investigation regarding the detention of persons illegally in the United States whom the FBI had lawfully arrested in connection with its investigation of the September 11 attacks. This Court has never extended *Bivens* to that context, and every other federal court of appeals that has considered the issues has declined to do so.

In this new context, numerous special factors counsel against extension of the *Bivens* remedy to this case, including, for example, concerns regarding: national security decisions made at the highest levels of government during a time of unprecedented national emergency; the administration of the nation's immigration laws; the constitutional separation of powers; the failure of Congress to provide a remedy to respondents despite its knowledge over many years of respondents' claims; and the existence of a complex administrative scheme governing the deportation of person illegally in the United States.

2. In denying qualified immunity to petitioner Ziglar for actions he took in the immediate aftermath

of the attacks of September 11, 2001, the court of appeals erred in two ways.

First, it failed to focus on the specific context of the case to determine whether the violative nature of Mr. Ziglar's alleged specific conduct was at the time clearly established. Instead, the court of appeals defined "established law" for purposes of evaluating a claim of qualified immunity at too high a high level of generality. It should have asked whether, in the context of the specific circumstances relating to the national emergency of 9/11, a reasonable person in Mr. Ziglar's position would clearly have understood that persons illegally in the country, whom the FBI had lawfully arrested and detained in connection with its investigation of 9/11, who shared geographic origins, ethnic backgrounds, and religious affiliations with the 9/11 attackers, but whom the FBI had not linked to any terrorist activity, could not be detained in restrictive conditions until cleared of any possible link to terrorism by the FBI. That understanding of the law was not clearly established at the time of 9/11, entitling Mr. Ziglar to qualified immunity for respondents' claims in this case.

Second, the court of appeals erred in concluding that, even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like Mr. Ziglar was not clearly established at the time in question, respondents nevertheless could maintain a § 1985(3) claim against him so long as his conduct violated some other clearly-established law. In *Davis v. Scheuer*, 468 U.S. 183 (1984), this Court held that

the defendants had an entitlement to immunity because the claims against them were based on due process and § 1983, which did not clearly prohibit the alleged misconduct, though that conduct clearly violated a regulation. This Court held that "officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation." *Id.* at 194 n.12. For that reason, Mr. Ziglar was entitled to qualified immunity for respondents' § 1985(3) claims as well.

3. The court of appeals also committed error in finding that respondents' Fourth Amended Complaint met the pleading requirements of this Court's decision in *Ashcroft v. Iqbal, supra.* The FAC here at issue relied on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with petitioner Ziglar's liability, but fall short of stating plausible claims against him.

On allegations indistinguishable from those in this case, this Court in *Ashcroft v. Iqbal* held that the actions of officials of the executive branch in restrictively confining an Arab Muslim who was illegally in the United States at the time of the 9/11 attacks were just as likely to be based on the officials' non-punitive and nondiscriminatory intent to detain aliens who were illegally present in the United States on 9/11 and who had the same national

origins and religious affiliations as the 9/11 attackers, on the ground they had potential connections to those who committed terrorist acts. For that reason, this Court in *Iqbal* held that the pleading at issue there, even though its allegations were consistent with punitive or discriminatory intent, failed plausibly to plead such intent because of the existence of this equally-likely and non-discriminatory explanation for the officials' actions.

The allegations of the complaint in *Iqbal* cannot be distinguished from the allegations of the FAC in this case. *Iqbal's* holding thus applies with equal force to respondents' claims against Mr. Ziglar in this case.

## ARGUMENT

### I. THE OPINION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S *BIVENS* JURISPRUDENCE AND CONFLICTS WITH THE DECISIONS OF FOUR OTHER COURTS OF APPEALS.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Brief For Petitioners Ashcroft and Mueller in the consolidated case, No. 15-1359, regarding why a remedy under *Bivens* should not be extended to the context of this case. With regard to this issue, Mr. Ziglar stands in exactly the same position as Mr. Ashcroft and Mr. Mueller, and the arguments they set forth in their Brief on this point apply to him with equal force. This ground furnishes an adequate and independent reason why this Court should

reverse the judgment of the court of appeals as to Mr. Ziglar.

## II. THE DECISION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S DECISIONS REGARDING QUALIFIED IMMUNITY.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Brief For Petitioners Ashcroft and Mueller in the consolidated case, No. 15-1359, regarding why the doctrine of qualified immunity shields the DOJ Defendants from liability in this case. With regard to this issue, Mr. Ziglar stands in exactly the same position as Mr. Ashcroft and Mr. Mueller, and the arguments they set forth in their Brief on this point apply to him with equal force. This ground also furnishes an adequate and independent reason why this Court should reverse the judgment of the court of appeals as to Mr. Ziglar.

## III. THE COURT OF APPEALS ERRED IN FINDING THAT THE ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT SUFFICE UNDER *IQBAL* TO STATE A PLAUSIBLE CLAIM FOR RELIEF.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Brief For Petitioners Ashcroft and Mueller in the consolidated case, No. 15-1359, regarding why the FAC fails to meet the pleading requirements of this Court's decision in *Iqbal*. He respectfully adds the following additional argument on this issue.

The panel majority sustained Count One of respondents' FAC, the substantive due process claim, on a theory of liability that respondents had never advanced in the thirteen-year history of this litigation, the "lists-merger" theory. The panel majority found that respondents had plausibly pleaded that Ashcroft made the decision to merge the New York list with the INS national list, thereby ensuring that those detainees on the New York FBI list who were held at the MDC "would continue to be confined in punitive conditions" and treated as "of interest" until the FBI cleared them of ties to terrorists or terrorist activity, App. to Pet. for Cert. at 32a; that Mr. Ziglar and Mr. Mueller knew of and complied with Mr. Ashcroft's decision in this regard, *id.* at 42a; and that the DOJ Defendants took these actions because of the race, religion, or national origin of respondents, and not for any legitimate penological interest. *Id.* at 44a.

Judge Raggi's opinion thoroughly analyzed the panel majority's approach, and demonstrated that no plausible factual averments supported respondents' substantive due process claims. *Id.* at 117a-139a. She noted that the FAC's allegations in this regard "are plainly not based on [respondents'] personal knowledge," *id.* at 120a, but on the panel majority's reading of the OIG Reports, Reports that belied the FAC's very allegations. *Ibid.*

Judge Raggi began with the panel majority's conclusion that Mr. Ashcroft had ordered the merger of the two lists of detainees, the threshold finding

upon which the panel majority based its conclusions. She correctly noted that the OIG Report "states quite clearly that it was Associate Deputy Attorney General Stuart Levey"–not Mr. Ashcroft, not Mr. Mueller, and most certainly not Mr. Ziglar–who "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." *Ibid.* (internal quotation marks omitted).

The panel majority's response to Judge Raggi's argument in this regard highlights the weakness of its analysis. The panel majority said that the OIG's conclusion that ADAG Levey made the lists-merger decision, not Mr. Ashcroft, did not absolve Mr. Ashcroft of responsibility for that decision because "the OIG Report gives no indication that anybody asked him." *Id.* at 38a. As Judge Raggi's opinion recognized, the panel majority's response "hardly supplies a factual basis for inferring Ashcroft's responsibility" for the lists-merger decision. *Id.* at 120a. Moreover, "the OIG's detailed 198-page, single-spaced report, which includes a careful discussion of when, how and by whom the merger decision was made" belied the panel majority's speculation on this point. *Id.* at 120a-121a.

Judge Raggi's opinion went on to demonstrate that the panel majority's conclusion as to the identity of the official who decided to merge the lists rested on speculation, conclusional assertions, and inaccurate readings of the OIG Reports. *Id.* 121a-125a. Her close reading of the FAC's allegations in this

regard led to the conclusion that "the pleadings, even with incorporation of the OIG Report, do not 'contain sufficient factual matter' plausibly to ascribe the lists-merger decision to the DOJ Defendants." *Id.* at 124a-125a (quoting *Iqbal*, 556 U.S. at 678).

Nor did the FAC plausibly allege that the DOJ Defendants intended, or even knew, that the result of the lists-merger would be the continued confinement of respondents in the ADMAX SHU. *Id.* at 125a-129a. The panel majority's conclusion in this regard rested on the allegation that Mr. Ziglar "received detailed daily reports of the arrests and detentions." *Id.* at 32a (internal quotation marks omitted). These reports, coupled with Mr. Ziglar's "central role" in the 9/11 investigation and "media coverage of conditions at the MDC" led the panel majority to conclude that the FAC plausibly alleged that Mr. Ziglar knew about the circumstances under which the detainees from the New York List were being held. *Id.* at 34a.

But the FAC did not allege what those "daily reports" contained: it alleged only that they were about "arrests and detentions." It provided no more detail. No more did it allege that the media specifically conveyed information about restrictive confinement of MDC detainees. Nor did the FAC allege plausible facts tending to establish that Mr. Ziglar's role in the 9/11 investigation, as Commissioner of INS, working long hours on a myriad of pressing problems in Washington, D.C., provided him with information about the conditions

of confinement of a limited number of detainees at the MDC in New York City. As Judge Raggi correctly observed, these allegations did not plausibly allege that Mr. Ziglar knew that the detainees were being held in restrictive confinement, or that the lists-merger decision had led to that result, the more so because those detainees on the FBI's New York List whom the government incarcerated at the Passaic County Jail–and that was most of the persons on the New York List–were held in general, not restrictive, confinement. *Id.* at 125a.

The FAC also failed to allege that Mr. Ziglar acted as he allegedly did " 'because of,' not merely 'in spite of' the action's adverse effects upon an identifiable group." *Iqbal*, 556 U.S. at 681. The factual averments of the FAC are, to say the least, consistent with an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (internal quotation marks omitted), namely, that whatever he is alleged to have done, Mr. Ziglar acted out of concern that persons illegally in the United States who had been lawfully arrested and detained in the 9/11 terrorist investigations, and "who had potential connections to those who committed terrorist acts," *ibid.*, could leave the country or engage in activities in furtherance of terrorist objectives if not detained until cleared in restrictive conditions that limited their ability to communicate with other persons.

In their Brief in Opposition to the petitions for certiorari, respondents recognized that "[t]he

problem in both [*Bell Atlantic Corp. v.*] *Twombly* [, 550 U.S. 544 (2007),] and *Iqbal* was that the plaintiffs had failed to plead facts which would 'ten[d] to exclude' an alternative 'explanation for defendants' ' conduct." Brief in Opposition, at 27 (quoting *Twombly*, 550 U.S. at 552 (citation omitted by quoting brief)). Respondents also recognized that "[i]n *Iqbal*, the 'obvious alternative explanation' the plaintiff had not excluded was a 'nondiscriminatory intent to detain aliens who were illegally present in the United States and *who had potential connections to those who committed terrorist acts*.' " *Id.* at 27-28 (quoting *Iqbal*, 556 U.S. at 682 (emphasis added by quoting brief)). They claimed they had supplied allegations that negated that obvious alternative explanation by pleading in this case that the DOJ Defendants " 'knew of and approved, [respondents'] confinement under severe conditions' " even though those defendants also knew that " 'the government had no evidence linking [respondents] to terrorist activity.' " Brief in Opposition, at 28 (quoting Panel Opinion, App. to Pet. for Cert., No. 15-1359, at 47a-48a (emphasis omitted)).[6]

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[6] Respondents' Brief in Opposition cited to the Appendix To the Petition For A Writ Of Certiorari that Mr. Ashcroft and Mr. Mueller filed with their joint Petition For A Writ Of Certiorari in No. 15-1359.

Respondents cannot distinguish *Iqbal* on that ground. Exactly as in this case, the plaintiff's complaint in *Iqbal* "challenge[d] neither the constitutionality of his arrest nor his initial detention in the MDC." 556 U.S. at 682. As in this case, in *Iqbal* the plaintiff complained only that he had been placed in the most restrictive conditions of confinement because of his race, religion, or natural origin, and not because the government had linked him to terrorism. *Ibid.* In *Iqbal*, the "complaint posit[ed] that [Ashcroft and Mueller] 'each knew of, condoned, and willfully and maliciously agreed to subject' respondent to harsh conditions of confinement 'as a matter of policy, ***solely*** on account of [his] religion, race, and/or national origin and ***for no legitimate penological interest.***' " *Id.* at 669 (quoting *Iqbal* complaint ¶ 96) (emphasis added).

Nothing in the *Iqbal* complaint suggested that the government had any information linking him to terrorist activity. To the contrary, the complaint before this Court in *Ashcroft v. Iqbal* alleged, just as the FAC in this case alleges, that government officials subjected Mr. Iqbal to restrictive confinement without any suspicion that he had engaged in any terrorist activity whatsoever. As the court of appeals opinion in that case stated, the complaint in *Iqbal* alleged that many of those arrested in connection with the FBI's 9/11 investigation, "including the Plaintiff, were classified as 'of high interest' solely because of their race, religion and national origin ***and not because of any involvement in terrorism***." *Iqbal v. Hasty*, 490

F.3d 143, 148 (C.A. 2 2007) (emphasis added) (footnote omitted). Indeed, the *Iqbal* complaint also alleged that "[i]n the New York City area, ***all Arab Muslim men*** arrested on criminal or immigration charges while the FBI was investigating a 9/11 lead were classified as 'of high interest,' " and held "in highly restrictive conditions until they were 'cleared' by the FBI." *Ibid.* (emphasis added). The district court similarly summarized the *Iqbal* complaint as alleging that the government officials he sued had classified Mr. Iqbal as " 'of high interest' to the government's terrorism investigation" and held him in "highly restrictive conditions" in the MDC ADMAX SHU "based solely on [his] race, religion and national origin, ***and not on any evidence of [his] involvement in supporting terrorist activities***." *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, Sept. 27, 2005, 2005 WL 2375202 *2 (E.D.N.Y.) (emphasis added).

The allegations in *Iqbal* thus cannot be distinguished from those in the FAC in this case. This Court in *Iqbal* held that, even accepting the truth of the allegations of the *Iqbal* complaint, "[a]ll it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Iqbal*, 556 U.S. at 683. When read in the context of the specific allegations of the *Iqbal* complaint, which alleged that Mr. Iqbal had been detained in "harsh conditions of confinement as

a matter of policy, ***solely*** on account of [his] religion, race, and/or national origin and ***for no legitimate penological interest,*** *id.* at 669 (emphasis added) (internal quotation marks omitted), "***and not because of any involvement in terrorism,***" *Iqbal v. Hasty*, 490 F.3d at 148 (emphasis added), this Court's ruling in *Iqbal* forecloses respondents' claims in this case. *Iqbal* found that the allegations of the complaint in that case identical to those here before the Court did not "contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post–September–11 detainees as 'of high interest' because of their race, religion, or national origin." *Iqbal*, 556 U.S. at 662. Just as in *Iqbal*, the allegations of discriminatory intent fail "to 'nudg[e respondents'] claim of purposeful discrimination 'across the line from conceivable to plausible.' " *Id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

Just as *Iqbal*, there exists an alternative explanation of Mr. Ziglar's alleged actions in implementing Mr. Ashcroft's decision to merge the New York List with the INS List. The FAC itself alleges Mr. Ziglar knew that the FBI had detained each and every person on the New York List in connection with its investigation of 9/11. He knew that each person on the New York List had been arrested upon probable cause. He knew that the FBI was properly detaining each person on the New York List, because each was an alien illegally in the United States at the time of the 9/11 attacks. And he knew that the persons on the New York List shared the same national origin, race, and religion with the

9/11 attackers, many of whom had also been in the United States illegally at the time of the attacks.

On these allegations, there exists an obvious alternative explanation for the actions that the FAC alleges that Mr. Ziglar took which, exactly as in *Iqbal,* renders the respondents' claims of unconstitutional motive implausible: "his nondiscriminatory intent to detain aliens who were illegally in the United States and who had potential connections to those who committed terrorist acts." *Iqbal*, 556 U.S. at 683. As Judge Raggi concluded with regard to respondents' substantive due process claims:

> "[G]iven (1) the inherent difficulty in identifying in advance of an FBI-CIA investigation who, among such a group of illegal aliens, might have terrorist connections; (2) the serious risk of murderous harm posed by persons with such connections (even while incarcerated); and (3) events following 9/11 fueling fears of further imminent attacks, I cannot conclude . . . [as to] the INS Commissioner [Mr. Ziglar] that, in the absence of individualized suspicion of terrorist connections, it was arbitrary or purposeless to national security to hold such illegal aliens in restrictive, rather than general, confinement

> pending clearance." App. to Pet. for Cert. at 135a (footnotes omitted).

Similarly, with regard to respondents' equal protection claims, the FAC's allegations that Mr. Ziglar and the other DOJ Defendants "maintained the challenged restrictive confinement after learning that the FBI designations were not based on individualized suspicion of terrorist threats are also inadequate to conclude that [Mr. Ziglar was] not more likely concerned with ensuring national and prison security" than with discriminating on the basis of race, national origin, or religion. *Id.* at 148a (internal quotation marks omitted).

For these reasons, the FAC failed to state a plausible claim that Mr. Ziglar deprived respondents of their fifth amendment substantive due process rights by subjecting them to restrictive conditions of confinement "for no legitimate penological interest." *Iqbal,* 556 U.S. at 669 (internal quotation marks omitted). Nor did the FAC plausibly state a claim that Mr. Ziglar violated respondents' fifth amendment equal protection rights by sub-subjecting them to restrictive confinement because of their race, national origin, or religion.

On this adequate and independent ground also, the Court should reverse the judgment of the court of appeals as to Mr. Ziglar in No. 15-1358.

## CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals For The Second Circuit as to petitioner, James W. Ziglar, in No. 15-1358.

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Nos. 15-1358, 15-1359 & 15-1363

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

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*Respondents.*

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DENNIS HASTY, *et al.*,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

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## QUESTIONS PRESENTED

1. Whether this action for damages against federal officials for violating the constitutional rights to due process of law and equal protection of the laws of persons detained in a federal correctional facility may proceed under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and progeny, where this Court has permitted similar actions in the past and where there would be no adequate remedy in the absence of *Bivens*.

2. Whether the detailed factual allegations in this case, which are supported by two Department of Justice Reports and specifically exclude the "obvious alternative explanation" that was relevant in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), state claims under Federal Rule of Civil Procedure 12(b)(6).

3. Whether selecting persons for solitary confinement and other punitive treatment based solely on their race, religion or ethnicity without any basis to suspect a connection to terrorism, violated these individuals' clearly established constitutional rights to due process of law and equal protection of the laws.

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## INTRODUCTION

Respondents are non-citizens who were arrested on civil immigration charges and then held in solitary confinement in a super-maximum security wing of a federal prison, where for months they faced uniquely harsh restrictions, harassment, and abuse. This treatment was not based on any individualized suspicion that Respondents were dangerous or had committed any crime, let alone had some connection to terrorism. Rather, Respondents' mistreatment followed from a policy, crafted at the highest levels of government, to treat harshly Muslim non-citizens of Arab and South Asian descent, based on the false and pernicious assumption that individuals with those characteristics might have some connection to terrorism.

Like numerous plaintiffs before them, Respondents brought a *Bivens* action to seek redress for abuse by federal officials in a federal prison. With detailed factual allegations of the kind not present in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Respondents plausibly allege that the former Attorney General, FBI Director, and INS Commissioner crafted a policy that knowingly consigned Muslim men of Arab or South Asian descent, suspected of nothing but overstaying their visas, to extreme punishment. Separately and independently, Respondents plausibly allege constitutional violations by the warden and associate warden responsible for the details of their ordeal, including abuse well beyond what higher-ranking officials ordered or prison regulations would ever permit. If these claims prove to be unfounded,

Petitioners will have opportunities to escape this litigation, including before trial. But at this early stage, Respondents have done enough to gain entry to the courthouse.

Petitioners emphasize that their actions came in the wake of an extraordinary attack on the United States. But "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). The September 11, 2001 attack was not the first crisis to test our nation's commitment to the rule of law, and it will not be the last. Accountability for the wrongs done to Respondents is critical to ensuring that future officials remember the Constitution is paramount.

## STATEMENT

Respondents filed this lawsuit to seek accountability and redress for flagrant violations of their clearly established constitutional rights. Following this Court's decision in *Iqbal*, Respondents amended their complaint to include detailed factual allegations, identifying the specific role played by each of the Petitioners. In addition to relying on information gathered from earlier stages of discovery in this case and other sources, Respondents bolstered their allegations with two Justice Department reports investigating the misconduct at issue. *See* JA34-335 (Office of Inspector Gen., U.S. Dep't of Justice, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration

Charges in Connection with the Investigation of the September 11 Attacks (Apr. 2003), https://oig.justice.gov/ special/0306/full.pdf ("OIG Report")); JA336-419 (Office of Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003), http://www.usdoj.gov/oig/special/0312/final.pdf ("Supplemental OIG Report").[1]

The Second Circuit agreed that Respondents stated plausible claims for relief that should be permitted to move forward.

### A. Round-Up Of Middle Eastern Men

The United States suffered tragic terrorist attacks perpetrated by Al Qaeda on September 11, 2001 ("9/11"). In their wake, the Federal Bureau of Investigation ("FBI") set up a tip line for civilians to supply information. App.265a (¶40).[2] Ninety-six thousand "tips" were received in the first week, most involving nothing more than generic suspicions of Arabs and Muslims. *Id.*; *see also* JA66-68. For example, one of the original plaintiffs in this case came to the FBI's attention based on his landlord's report "that she rented an apartment . . . to several

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[1] Respondents' citations to the Joint Appendix are indicated by "JA#". These citations refer to the OIG Report and Supplemental OIG Report. Citations with a ¶ number refer to paragraphs of the Fourth Amended Complaint.

[2] "App." refers to the Appendix to the Petition for a Writ of Certiorari filed by Petitioners Ashcroft and Mueller (No. 15-1359).

Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.'" App.8a n.9 (quoting App.334a (¶251)).

Petitioner Robert Mueller, then the Director of the FBI, departed from prior practice and ordered each of those tips investigated, even if the sole basis of "suspicion" was the individual's religion, ethnicity, country of origin, or race. App.265a (¶40). Petitioner John Ashcroft, then the Attorney General, directed Mueller to vigorously question any male from a Middle Eastern country between the ages of 18 and 40 who came to the FBI's attention. App.265a (¶41). Ashcroft further instructed Mueller to tell the Immigration and Naturalization Service ("INS"), headed by then-Commissioner Petitioner James Ziglar, to round up every immigration violator fitting this profile. *Id.*

The result, as a high-ranking Justice Department official described it, was "custody without triage," with no "vetting" to ensure the law enforcement response was based on something other than ethnicity. App.267a (¶45). As a "variety" of officials explained, "it soon became evident that many of the people arrested . . . might not have a nexus to terrorism." JA109-110; *see also* JA150-151.

Ashcroft and Mueller understood and expected the natural effect of their directives: that many individuals in the targeted religious and ethnic groups would be swept up without any legitimate basis to suspect them of terrorism. App.265a, 267a (¶¶41, 44). Ashcroft, Mueller and Ziglar (the "DOJ Petitioners") received detailed daily reports and were aware that the FBI had no information tying

Respondents to terrorism prior to treating them as "of interest" to the terrorism investigation. App.267a-268a (¶47). Ashcroft followed these arrests particularly closely, receiving a daily "Attorney General's Report" prepared by Ziglar. App.275a (¶¶63, 64).

The complete absence of vetting came to a head in October 2001, when DOJ Petitioners learned the FBI's New York field office was keeping a separate list of non-citizens, including many Respondents and class members, for whom the FBI had not asserted any interest (or lack of interest). App.268a (¶47); *see also* JA123-129. Ashcroft knew of this glaring flaw, yet ordered everyone on this "New York List" treated as "of interest" to the terrorism investigation, with the restrictive treatment that followed. App.267-68a (¶47). That decision overrode significant intra-department criticism. *Id.*

At least 561 men were arrested in New York and New Jersey, far exceeding the capacities of New York-area federal detention centers. App.268a (¶49); JA75. Most were eventually charged with civil immigration violations, some after weeks or even months of detention without charge. App.269a (¶52). Even after final removal or voluntary departure orders, Ashcroft ordered that all non-citizens encountered during the 9/11 investigation be held until cleared of any connection to terrorism. App.270a (¶55). Ashcroft further ordered that these policies be implemented without a paper trail. App.265a (¶39), *see also* JA175-177.

Mueller ordered the clearance investigations run out of FBI headquarters, under his direct control.

App.271a (¶57). He had daily contact with the FBI field offices about the status of individual clearances. *Id.* Even after Respondents were cleared by the field office, Mueller would not authorize their release until their cases were reviewed at headquarters. *Id.*

Eighty-four detainees, including Respondents, were sent to the Metropolitan Detention Center ("MDC"), a federal jail in Brooklyn. App.253a (¶4); JA219. The detainees were not told why they had been singled out; many were informed that they would be deported shortly, consistent with immigration law. App.272a (¶59). Instead, months passed and they remained in isolation, with some concluding they might be held forever. *Id.*

### B. Harsh And Punitive Conditions

In the weeks after 9/11, Ashcroft and Mueller "met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure" on the men arrested as a result of their orders. App.274a-275a (¶61). The group decided to restrict detainees' ability to contact the outside world and delay their immigration hearings. App.274a-275a (¶61); *see also* JA72, 220-22. The DOJ Petitioners also directed that officers responsible for interacting with the detainees be told that they were suspected terrorists who "needed to be encouraged *in any way possible* to cooperate." App.274a-275a (¶61) (emphasis added).

Since Respondents' contact with the outside world could not be restricted in a general population unit, and because the Bureau of Prisons ("BOP") did not know whether the detainees posed a threat, the BOP

ordered the detainees held in restrictive confinement. JA220-21. Petitioners Dennis Hasty, then warden of the MDC, and James Sherman, then associate warden for custody (the "MDC Petitioners"), combined existing BOP procedures for administrative detention and disciplinary segregation, to create a new Administrative Maximum Special Housing Unit ("ADMAX SHU"). App.276a-277a, 279a-280a (¶¶68, 75-76). The ADMAX SHU was a solitary confinement unit[3] where detainees were locked in their cells 23 to 24 hours-a-day. When removed from their cells for any reason detainees were placed in handcuffs, shackles, a waist chain, and the physical grip of four guards. App.279a-280a, 289a-290a (¶¶76, 104). BOP regulations do not authorize placing prisoners in prolonged isolation without good cause, but MDC Petitioners ordered it anyway, fabricated the existence of such cause, and ignored regulations mandating periodic review of these conditions. App.276a-277a, 279a (¶¶68, 74).

Along with 23-hour lockdown, MDC Petitioners approved a policy of unprecedented restrictions. Respondents were prohibited from keeping hygiene

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[3] Consistent with many "solitary" confinement units, "double-celling" occurred for some Respondents for some periods of time. *See* U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing (Final Report) 3 (Jan. 2016), https://www.justice.gov/dag/file/815551/download; JA343. Other Respondents spent their time in complete isolation. *See, e.g.*, App.313a-314a, 315a-316a (¶¶182, 188) (Benatta held for five months in solitary confinement without cellmate); App.329a (¶234) (Bajracharya held for two months in solitary confinement without cellmate).

supplies in their cells, including toilet paper, soap, a toothbrush, toothpaste or a cup for drinking water (App.298a (¶130)); the cells were illuminated all day and night, and guards banged on the bars of their cell doors through the night, depriving them of sleep (App.295a (¶¶119-20)); Respondents were not provided with adequate clothing to take advantage of their opportunity for "recreation," in a cold, barren cage open to the elements (App.296a (¶¶122, 126)); the ADMAX SHU range was so cold during the winter that guards wore jackets, yet the detainees were denied warm clothing and extra blankets (App.297a-298a (¶¶126-27)); they were denied copies of the Koran (App.299a (¶132)); telephone calls and visits were either prohibited or strictly limited (App.281a-282a (¶¶79, 83)); and attorney-client visits, once they occurred, were recorded (App.287-288a (¶98)). Detainees were routinely strip-searched, not just after leaving their cells, but before leaving and sometimes at "random" in their cells. App.292a-300a (¶¶112-18); *see also* JA231-32, 282-89; JA234-37 (photographs of the ADMAX SHU).

Respondents were also abused by MDC guards (App.290a (¶105)), who had been falsely informed that the detainees were connected to the September 11 attacks (App.274a-275a (¶61)). Hasty facilitated this abuse by referring to Respondents as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. App.280a-281a, 301a (¶¶77, 140). The resulting abuse included slamming the handcuffed and shackled detainees into the wall during transports (breaking Respondent Mehmood's hand), stepping on their shackles and twisting their

hands and fingers, making degrading sexual comments during strip searches, conducting such searches in front of female guards and videotaping them, calling them "fucking Muslims" and "camels," and shouting "shut the fuck up" (or yelling "Jesus") when they prayed. *See* App.290a-294a, 300a, 303a, 307a (¶¶105, 109-10, 115, 136, 147, 162); *see also* JA384-87.

Though Hasty sought to avoid witnessing this abuse, he nonetheless became aware of it. App.259a-260a (¶24); *see also* JA45 (noting media reports of mistreatment soon after detentions began). Videotapes that likely showed abuse were destroyed. App.291a (¶107); *see also* JA406-07.

Like the original decision to round them up in connection with the 9/11 investigation, Respondents' assignment to the ADMAX SHU was not based on any indication of a connection to terrorism. App.253a-254a (¶4). Under Ashcroft's policy, Respondents were to be held in these conditions until cleared by FBI headquarters of any connection to terrorism, although some Respondents languished for months in solitary confinement even after being cleared. App.270a, 274a-275a, 315a-316a, 322a, 326a-327a (¶¶55, 61, 188, 211, 226); JA246.

Those who did not fit Ashcroft's profile had very different experiences. For example, five Israelis detained for allegedly celebrating on 9/11 were held in the MDC, but were allowed visits before Respondents or any other detainees, and were among the first released from the ADMAX SHU, without a clearance letter from FBI headquarters. App.266a-

267a (¶43). Other obviously non-Arab and non-Muslim arrestees were released immediately. *Id.*

### C. Respondents' Experiences

Respondents Ahmer Iqbal Abbasi and Anser Mehmood are Pakistani Muslims related by marriage. App.256a (¶¶13-14). Both came to the attention of the FBI through an anonymous tip that a false social security card had been left at the New Jersey Department of Motor Vehicles by a "male[,] possibly Arab" using Abbasi's address; the card was left by Abbasi's houseguest, but Abbasi was arrested for an immigration violation. App.302a (¶¶143-44). While arresting Abbasi, the FBI came across the name of his sister Uzma, Mehmood's wife. App.306a (¶158). Uzma was caring for their infant son, so Mehmood requested that he be arrested in her place. The FBI agreed, telling Mehmood that he faced only minor immigration charges and would be released shortly. App.306a-307a (¶158-59). Both Abbasi and Mehmood were detained for four months in the ADMAX SHU. App.302a, 305a, 307a, 310a (¶¶145, 152, 162, 170).

Respondent Benamar Benatta is an Algerian Muslim. App.256a-257a (¶15). He was detained by Canadian officials a few days before 9/11 while attempting to enter Canada from the United States to seek refugee status (which was later granted). App.256a-257a, 310a-311a (¶¶15, 172-73). On September 12, 2001, Canadian officials reported Benatta to authorities in the United States, and transported him to New York. App.310a-311a (¶173). Benatta was held at the ADMAX SHU for

over seven months, where he suffered profound effects on his mental health. App.311a, 315a-317a (¶¶174-75, 188, 193). When Benatta was found banging his own head on the cell door, guards beat him, tied him to a metal bedframe in a solitary strip-cell and left in restraints for hours, and then held him without a cellmate for five months. App.313a, 315a-316a (¶¶182, 188).

Respondent Ahmed Khalifa is an Egyptian Muslim who came to the United States for a vacation from his medical studies. App.257a, 318a (¶¶16, 194). He and his roommates were arrested on immigration charges following a tip that several Arabs living at Khalifa's address were renting a post-office box, and perhaps sending out large quantities of money. App.318a (¶195). Khalifa was detained in the ADMAX SHU for close to four months. App.319a-320a, 322a (¶¶200, 204, 211). On one occasion, guards left Khalifa outdoors in a recreation cage for four hours in freezing weather, laughing at him as he repeatedly asked to be brought inside. App.297a (¶125). When the FBI interviewed Khalifa in October 2001, an officer noticed bruises on his wrist and informed Khalifa that he was being abused because he is Muslim. App.319a-320a (¶202). The FBI recorded no suspicions of Khalifa and cleared him shortly thereafter, but Khalifa remained in the ADMAX SHU months longer. App.322a (¶211).

Respondent Saeed Hammouda is also an Egyptian Muslim; he has never learned what led to his arrest. App.257a, 324a (¶¶17, 217); *see* App.326a (¶224). He lawfully entered the United States in 1999 on a business visa and subsequently received a

student visa. App.323a (¶214). He studied marketing and married a United States citizen in 2001, who petitioned for him to receive lawful permanent resident status. *Id.* In October 2001 he was temporarily staying in the Manhattan apartment of a friend when FBI and INS agents arrived, questioned him, and seized some of his friend's property. App.323a (¶215). He was arrested a week later, and charged with working without a visa. App.324a (¶217). Upon arrival at the MDC he was beaten, strip-searched three times, called a "terrorist" and an "Arabic asshole" and taken to the ADMAX SHU. App.324a (¶218). In the winter, Hammouda could not sleep because of the lights in his cell, and because the unit was so cold. App.326a (¶223). He was held in the ADMAX SHU for eight months. App.324a (¶218).

Respondent Purna Raj Bajracharya is a Nepalese Buddhist who overstayed a visitor visa to work and send money home to his family. App.257a, 327a (¶¶18, 229). He came to the attention of the FBI when filming New York streets to show his wife and children. App.328a (¶230). An informant told the FBI that an "Arab male" was videotaping outside a building that contained government offices, leading to Bajracharya's arrest and detention in the ADMAX SHU for three months. App.328a-330a (¶¶230, 232, 234, 237). Bajracharya's relatively short detention was likely the result of intervention on his behalf by the FBI agent assigned to investigate his case, who repeatedly questioned his supervisors as to why Bajracharya remained in the ADMAX SHU after having been quickly cleared of any connection to terrorism. App.329a-330a (¶¶235-36, 238). His

solitary confinement was nonetheless so traumatizing that Bajracharya wept constantly in his cell (for which he was reprimanded by guards), and reported suicidal thoughts. App.331a (¶241).

Redacted versions of Respondents' FBI files were produced in discovery against the United States, and reveal that the FBI never had much interest in Respondents. *See* Letter from Stephen E. Handler, at 4, *Turkmen v. Ashcroft*, No. 02-cv-02307 (E.D.N.Y. July 3, 2008), ECF No. 639. For example, Abbasi was interviewed only once by the FBI, cleared by the New York field office on November 1, 2001, but remained in the ADMAX SHU until February as the New York office repeatedly asked headquarters about Abbasi's status. App.304a-305a (¶¶149-52).

The FBI's lack of any real interest in the detainees was made clear to MDC Petitioners, who were provided regular written updates explaining how each detainee was connected to the 9/11 investigation, along with evidence relevant to any threat each posed. App.277a (¶69). For example, MDC Petitioners were informed that Khalifa was arrested because he was "encountered by INS" while following an FBI lead and charged with a violation of the Immigration and Nationality Act ("INA"), and that the "FBI may have an interest in him." App.277a-278a (¶70). Similarly innocuous information was provided about the others. App.278a-279a (¶¶71-73).

### D. Decision Below

This *Bivens* action was filed in April 2002 by a different group of former detainees held at the MDC and another facility. The case included claims by five MDC plaintiffs against the United States, which agreed to settle for $1.26 million, in exchange for those plaintiffs dropping their claims against the individual defendants. Ex. A to Letter from Rachel Meeropol, *Turkmen v. Ashcroft*, No. 02-cv-02307 (E.D.N.Y. Nov. 16, 2009), ECF No. 687.

Respondents intervened and filed the operative complaint in 2010, adding new and detailed allegations in light of this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The district court dismissed Respondents' claims against DOJ Petitioners, but denied MDC Petitioners' motion to dismiss.

The court of appeals held that Respondents' claims survived all of the motions to dismiss. Although DOJ Petitioners did not challenge the existence of a *Bivens* remedy on appeal (App.21a), the Second Circuit addressed the issue, holding that a claim of punitive treatment in federal detention "stands firmly within a familiar *Bivens* context." App.25a.

The court of appeals next canvassed the voluminous allegations and found plausible Respondents' constitutional claims. The complaint alleged that DOJ Petitioners were "aware" that immigration detainees were "being detained in punitive conditions of confinement in New York," and knew that "there was no suggestion that those

detainees were tied to terrorism except for the fact that they were, or were perceived to be, Arab or Muslim." App.31a-32a. The court concluded that the OIG Report "supports the reasonable inference that [the lack of suspicion for many detainees], known by other DOJ officials, came to the attention of the DOJ [Petitioners]." App.37a. Without "[i]ndividualized suspicion," the harsh conditions imposed on Respondents were "arbitrary or purposeless" in violation of the Due Process Clause. App.46a.

The court of appeals likewise concluded that the allegations stated a plausible claim for relief under the Equal Protection Clause. The complaint and OIG Report "g[a]ve rise to . . . reasonable inferences" that the FBI in New York targeted individuals "based on race, ethnicity, religion and/or national origin," and Petitioners knowingly merged the New York List with the nationwide list, subjecting individuals suspected of nothing to face the challenged conditions of confinement. App.61a; *see also* App.80a-81a. "[U]nlike in *Iqbal*, there was no legitimate reason to detain [Respondents] in the challenged conditions," and thus "no obvious, more likely explanation" for Petitioners' actions. App.65a-66a.

The Second Circuit recognized that "[d]iscovery may show that" Petitioners "are not personally responsible for detaining [Respondents] in [the alleged] conditions," or that "national security concerns motivated the [Petitioners] to take action." App.84a-85a. But "at this stage," the court could not conclude that individuals "caught up in the hysteria" by reasons of their "perceived faith or race" could

constitutionally be subjected to "[t]he suffering [they] endured." *Id.* Without further development of the facts, the court could not assume that "violation[s] of the constitutional rights on which this nation was built" were justified. App.85a.

With respect to the MDC Petitioners, the court of appeals found plausible claims against Petitioners Hasty and Sherman, but dismissed claims against Warden Zenk, who replaced Hasty as warden of the MDC shortly before the last Respondent was released from the ADMAX SHU. 54a.

The court held that Respondents adequately alleged MDC Petitioners' personal involvement in creating ultra-restrictive conditions of confinement, while knowing that the FBI had not developed any information to tie Respondents to terrorism. App.50a-51a. Punitive intent and discriminatory intent could be inferred from MDC Petitioners' knowing placement of the Muslim detainees in unnecessarily restrictive conditions, their attempts to cover up violations of BOP policy, and their use or allowance of racially and religiously charged language. App.52a-54a, 70a-73a.

Judge Raggi dissented in part from the panel decision, and her dissent was incorporated in full by six judges of the Second Circuit, who dissented from the denial of Petitioners' motions for rehearing. App.86a-163a, 240a-250a.

Every judge on the Second Circuit who considered Respondents' claims agreed that the claim of Hasty's deliberate indifference to physical and verbal abuse could move forward. App.54a-57a, 148a n.41.

## SUMMARY OF THE ARGUMENT

1. a. Respondents were federal detainees who Petitioners subjected to abuse and discrimination in a federal prison in New York. They have only one remedy available to them, one this Court already has recognized and Congress has ratified: a *Bivens* action for damages against federal officers. No extension of this longstanding doctrine is necessary, notwithstanding Petitioners' argument that their unconstitutional conduct involved high-level policy said to implicate immigration and national security.

Even if the Court were to find such an extension required, a *Bivens* remedy is appropriate. This is Respondents' only remedy, and it is necessary to deter federal officials from violating the clearly established constitutional rights of those in civilian custody, and to compensate the victims of such abuse. These factors strongly counsel in favor of recognizing a remedy here, as does the judiciary's expertise in considering due process and equal protection claims. That the unconstitutional policy was created by high-level officials and is claimed to implicate national security and immigration are not "special factors" counseling hesitation. High-level policy can violate the clearly established rights of many, making deterrence against the architects of such policies more important, not less. While Respondents are non-citizens, their claims have nothing to do with immigration enforcement. Nor do they arise in the military context, where the judiciary's review might present separation of powers concerns that implicate national security. Petitioners invoke "national security" in unsworn

briefs, but the complaint alleges they *knew* Respondents were not individually suspected of anything related to terrorism.

b. Respondents' detailed factual allegations state plausible equal protection and substantive due process claims against DOJ Petitioners. The complaint includes factual allegations of a policy by DOJ Petitioners to target Muslim men of Arab and South Asian descent for law enforcement scrutiny, and to hold such men in isolation and treat them harshly, knowing there was no reason to suspect them of ties to terrorism. These factual allegations, not present in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), raise plausible inferences of punitive and discriminatory intent, and cannot be defeated by Petitioners' unsworn alternative explanations, which contradict the complaint.

c. DOJ Petitioners are not entitled to qualified immunity on the pleadings. By 2001, precedent clearly informed federal officials that they could not impose upon detainees arbitrary and purposeless prison restrictions bearing no reasonable relationship to a legitimate governmental interest, and certainly could not single out detainees for such restrictions on the basis of race, religion or ethnicity. DOJ Petitioners' implicit argument is that even without an articulable reason to suspect Respondents of any connection to terrorism, national security justified holding Muslim men of Arab or South Asian descent in restrictive conditions given the "inherent difficulty" of determining who might be a terrorist. Far from stating a legitimate basis for qualified immunity, DOJ Petitioners attempt to

revive the discredited legacy of *United States v. Korematsu*, 323 U.S. 214 (1944).

2. a. Respondents' separate claims against MDC Petitioners survive, regardless of how the Court rules on the claims against DOJ Petitioners. The Court has previously recognized *Bivens* claims against high-ranking Bureau of Prisons officials for mistreatment in federal prisons. Respondents' claims that the warden and associate warden of a federal prison subjected them to harsh conditions of confinement without justification, and based on race, religion and ethnicity, break no new ground. Indeed, every judge to consider the issue has agreed that the claims against Petitioner Hasty, for deliberate indifference to physical and verbal abuse, arise in a familiar *Bivens* context.

b. The Second Circuit also correctly found that the deliberate indifference claim against Hasty is plausible, as the complaint alleges that he willfully blinded himself to abuse, learned of it nonetheless, and failed to correct it.

Respondents' allegations concerning the "official" conditions of confinement also state plausible substantive due process, equal protection, and Fourth Amendment violations. Petitioners point to "FBI terrorism designations" and "binding BOP policy" to avoid the fair inferences raised by their individual decisions to design ultra-restrictive conditions of confinement, but neither the information they received from the FBI, nor BOP policy, provided any justification for the unprecedented and wholly unjustified restrictions they imposed.

MDC Petitioners cannot claim the protection of qualified immunity, because placing civil detainees in restrictive isolation without individualized justification violates BOP policy and clearly established law, as do the other restrictions the wardens designed. Their attempts to cover up their violations of BOP regulations, by falsely claiming the detainees were classified based on the individual danger they posed, supports the clearly established nature of the violations.

3. Petitioners are not entitled to qualified immunity for Respondents' section 1985(3) claim. All federal officers had clear warning in 2001 that they could not engage in unconstitutional discrimination, thus they could not have reasonably believed they could conspire to do so. MDC Petitioners' argument for an intra-corporate conspiracy shield is unsupported and inadequately developed, as the court of appeals found.

## ARGUMENT

### I. Claims Against The DOJ Petitioners Survive A Motion To Dismiss.

#### A. A *Bivens* Remedy Is Available Against Federal Officials Responsible For The Abuse Of Prisoners At A Federal Jail On U.S. Soil.

Although law enforcement officials had no basis for suspecting them of connections to terrorism, Respondents and dozens of other Muslim men of Arab or South Asian descent were isolated in a

super-maximum security wing of a federal prison, and subjected to the harshest conditions permitted in the federal prison system (and worse). A *Bivens* action is their only available remedy, and is critical to ensuring that future law enforcement officers—from prison guards to the Attorney General, and everyone in between—respect the rule of law. If a federal detainee can prove that a federal official, even a high-ranking one, personally violated his clearly established constitutional rights, such a wrong should not go without a remedy.

### 1. The *Bivens* Remedy Is Well Established And Has Been Ratified By Congress.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized an implied private damages action to remedy constitutional violations by federal officers. Though Mr. Bivens could have sued for compensation under state trespass law, the Court recognized that a federal remedy was needed because a federal officer acting unconstitutionally "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* at 392.

Although *Bivens* involved a claim under the Fourth Amendment, this Court has extended it twice, allowing damages actions under the Eighth Amendment for unconstitutional prison conditions, and under the Fifth Amendment for unconstitutional discrimination. *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

Congress has consistently ratified this Court's development of common law remedies for constitutional violations. *See generally* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117 (2009). In 1974, when Congress amended the Federal Tort Claims Act ("FTCA") to allow individuals to sue the federal government for certain law enforcement torts, it was "crystal clear that Congress viewed FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20; *see also id.* (quoting S. Rep. No. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791). In 1988, when Congress passed the Westfall Act to provide for the substitution of the United States for federal officials sued in civil actions, it exempted claims "brought for a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2)(A), in order to "preserv[e] [federal] employee liability for *Bivens* actions." *United States v. Smith*, 499 U.S. 160, 173 (1991). And in 1996, rather than eliminate *Bivens* claims, Congress specifically contemplated and acquiesced to *Bivens* actions "brought with respect to prison conditions," while simultaneously creating an exhaustion requirement for such claims. *See* 42 U.S.C. § 1997e(a); 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) (exhaustion requirement would deter frivolous *Bivens* claims while *Bivens* "claims with a greater probability/magnitude of success would, presumably, proceed").

As this Court has recognized, congressional ratification of an implied damages remedy must be respected, even though this Court has come to

disfavor the creation of new private rights of action. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72-73 (1992) (Congress had validated implied remedy under Title IX by "ma[king] no effort to restrict the right of action recognized in *Cannon* [*v. University of Chicago*, 441 U.S. 677 (1979)]"); *see also id.* at 78 (Scalia, J., concurring).

Petitioners go to great lengths to impugn *Bivens*. But while the Court has guarded against exotic new rights of action (*e.g.*, *Wilkie v. Robbins*, 551 U.S. 537 (2007)), it has preserved *Bivens*' core. Part of this core, one explicitly recognized and ratified by Congress, is constitutional actions against federal officials concerning prison conditions. *Carlson*, 446 U.S. at 23; 28 U.S.C. § 2679(b)(2)(a). That is precisely the type of *Bivens* remedy the court of appeals applied here, one for "federal detainee Plaintiffs, housed in a federal facility, [who] allege that individual federal officers subjected them to punitive conditions." App.24a. Just as surely as improper extension of *Bivens* would present separation of powers concerns, so too would the improper *limitation* of congressionally-ratified *Bivens* actions.

### 2. Claims Of Abuse In Federal Custody Are Core, Long-Recognized *Bivens* Claims.

This Court has counseled caution before creating new claims that are "fundamentally different from anything recognized in *Bivens* or subsequent cases." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). But before making a common-law

determination of whether a new remedy is necessary, the first question is whether courts are truly being asked to "authoriz[e] a new kind of federal litigation." *Wilkie*, 551 U.S at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). Here, they are not.

This Court's precedents suggest that the context of a proposed *Bivens* claim is new in three circumstances, none of which is present here. First, there is an extension of *Bivens* if it is applied to a new constitutional right. *See, e.g.*, *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (noting that Court has "several times assumed without deciding that *Bivens* extends to First Amendment claims").

Second, an extension of *Bivens* is required for a new "category of defendant." *See FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (federal agency); *Malesko*, 534 U.S. at 66 (private entity); *Minneci v. Pollard*, 565 U.S. 118, 119 (2012) (private prison employee). But one "category of defendants" has always been at the *Bivens* heartland: federal officials. That category, as this Court has applied it, includes not just low-level law enforcement officers and prison guards (*Bivens*, *Carlson*), but also high-level policymakers, including the Director of the Bureau of Prisons (*Carlson*) and members of Congress (*Davis*).

Third, even if a *Bivens* cause of action has previously been recognized under a given constitutional provision and against the same category of defendant, an extension of *Bivens* is required if the context in which the claim arises creates previously unexplored separation of powers concerns. For example, in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483

U.S. 669 (1987), the Court declined to extend *Bivens* to claims incident to military service, given the "explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Stanley*, 483 U.S. at 681-82 (quoting U.S. Const., art. I, § 8, cl. 14). Likewise, while *Davis v. Passman*, 442 U.S. 228 (1979), established a *Bivens* cause of action under the due process clause, the elaborate administrative scheme at issue in *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988), posed previously unconsidered separation of powers concerns. *See Meyer*, 510 U.S. at 484 n.9.[4]

Respondents' claims against DOJ Petitioners challenge their mistreatment in federal custody, in violation of the constitutional guarantees of equal protection and substantive due process. Such claims are at the core of *Bivens*, hardly representing "a new kind of federal litigation." *Wilkie*, 551 U.S at 550 (citation omitted).

Respondents challenge the imposition of highly restrictive conditions of confinement on the basis of religion and ethnicity. This Court has "allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Iqbal*, 556 U.S. at 675. While Respondents have made different (and significantly more detailed) factual allegations than

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[4] The Second Circuit's discussion of the "mechanism of injury" is best understood as reflecting these categories of cases in which a recognized right was asserted, but against a new category of defendants or in a new circumstance presenting distinct separation of powers concerns.

the plaintiffs in *Iqbal*, *infra* pp. 52-54, the factual background is indistinguishable: non-citizens suing federal officials, including high-ranking ones, for discriminatory placement in restrictive conditions in the aftermath of 9/11. *Iqbal*, 556 U.S at 666, 668-69. The Court in *Iqbal*, after expressing skepticism about a separate "First Amendment claim," "assume[d], without deciding" that it could be "actionable under *Bivens*." *Id.* at 675. But the Court saw no need to assume anything regarding the plaintiffs equal protection claim, strongly suggesting that no extension of *Bivens* to a new context was required for that claim.

Respondents also challenge the arbitrary and punitive conditions of confinement they suffered, in violation of their rights to substantive due process. Claims that a federal prisoner has been abused have long been recognized as proper under *Bivens*. *Carlson*, 446 U.S. 14 (recognizing *Bivens* action where prison officials were deliberately indifferent to serious medical need); *see also Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Malesko*, 534 U.S. at 72 ("If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer"). While the Eighth Amendment applies only to individuals who have been convicted of a crime, other detainees have the same (if not greater) rights to be free from abuse as a matter of substantive due process. *See Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979); *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). Thus, as Justice Scalia noted, *Bivens* actions are "available to federal pretrial detainees challenging the conditions

of their confinement," claims that would necessarily be based on due process. *Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J, dissenting).[5]

Petitioners claim that this Court has never specifically endorsed a substantive due process or equal protection claim challenging conditions of confinement. Ashcroft Br. 21.[6] As an initial matter, they ignore *Iqbal*, which saw nothing controversial about an equal protection conditions-of-confinement claim. In any event, Petitioners do not explain why the inquiry must be so circumscribed. This Court has already approved of *Bivens* claims for prison abuse, including against high-level officials. It has recognized claims under the Due Process Clause. A conditions of confinement suit arising under the Due Process Clause is not at some exotic frontier of *Bivens* litigation.

Petitioners further argue that Respondents seek an extension of *Bivens* by "challeng[ing] high-level

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[5] Circuit courts have routinely recognized substantive due process challenges to conditions of confinement under *Bivens*. *See Thomas v. Ashcroft*, 470 F.3d 491, 496-97 (2d Cir. 2006); *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc); *Bistrian v. Levi*, 696 F.3d 352, 372-75 (3d Cir. 2012); *Magluta v. Samples*, 375 F.3d 1269, 1277 (11th Cir. 2004); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989); *Lyons v. U.S. Marshalls*, 840 F.2d 202, 203-04 (3d Cir. 1988).

[6] We use the following abbreviations: Brief for Petitioners filed by Ashcroft and Mueller, No. 15-1539 ("Ashcroft Br."); Brief of Petitioner James W. Ziglar, No. 15-1358 ("Ziglar Br."); Brief for Petitioners Dennis Hasty and James Sherman, No. 15-1363 ("Hasty Br."); Brief of Former U.S. Attorneys General as Amicus Curiae in Support of Petitioners, ("Barr Br.").

policy decisions . . . in a context that implicates both national security and immigration." Ashcroft Br. 22. Those are just contestable factual circumstances surrounding the case (as unilaterally characterized by Petitioners), not harbingers of "a new kind of federal litigation." *Wilkie*, 551 U.S at 550 (citation omitted). No case supports Petitioners' notion that case-to-case factual variations require an "extension" of *Bivens* with the full analysis that entails and this Court's approach in *Iqbal* refutes it. But even on its own terms, Petitioners' invocation of (a) their high-level positions, (b) the alleged immigration implications, and (c) the alleged national security implications, do not establish that this case presents an extension of *Bivens*.

a. *High-Level Officials.* Petitioners' status as policymakers does not change the context of Respondents' claims. *See* Ashcroft Br. 22. *Carlson* involved a policymaker defendant—the Director of the Federal Bureau of Prisons—but he did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against [him] might be inappropriate." 446 U.S. at 19 (citing *Davis*, 442 U.S. at 246). The Court concluded that qualified immunity would mitigate the concern that claims might "inhibit their efforts to perform their official duties." *Id.* Similarly, in *Iqbal*, the plaintiff sued the former Attorney General and FBI director for the same policies at issue in this case, and the Court never intimated that these officials' position required an extension of *Bivens*. 556 U.S. at 675; *see also, e.g.*, *Trulock v. Freeh*, 275 F.3d 391, 404-06 (4th Cir. 2001) (*Bivens* action against FBI Director), *cert. denied*, 537 U.S. 1045

(2002). Indeed, if status as a high-level official required an "extension" of *Bivens*, the Court likely would have mentioned it when it rejected the Attorney General's claim to absolute immunity for his national security decisions, and specifically discussed the importance of a *Bivens* remedy for constitutional violations in that context. *Mitchell v. Forsyth*, 472 U.S. 511, 520-24, 523 n.7 (1985).

b. *Immigration.* Petitioners rely (Ashcroft Br. 22 n.7) on circuit court decisions holding that claims challenging immigration enforcement actions require an extension of *Bivens*. *See Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (challenge to immigration detention); *see also De La Paz v. Coy*, 786 F.3d 367, 375 (5th Cir. 2015) (challenge to immigration arrest). But they disregard the fact that *Bivens* claims alleging *abuse* while in immigration custody are routinely heard. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1009-11 (9th Cir. 2002); *Humphries v. Various USINS Fed. Emps.*, 164 F.3d 936 (5th Cir. 1999). While claims concerning the exercise of immigration powers (such as admission and removal) might arguably present a new *Bivens* context, a conditions-of-confinement claim is familiar and does not depend on the reason the individual is in custody.

c. *National Security.* Petitioners' argument that national security policy might transform the familiar issue of conditions of confinement in a federal prison into a "novel context" (Ashcroft Br. 22), is also unsupported. Petitioners rely on circuit court cases involving military detention, *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Lebron v.*

*Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), and overseas law enforcement operations, *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc). The difference between these contexts and the treatment of prisoners in civilian custody in a federal jail on U.S. soil is stark.

Petitioners would gloss over this difference, insisting that "Respondents were not garden-variety prisoners (or even ordinary pre-trial detainees)," Ashcroft Br. 22, but that is a non-sequitur. Even if Respondents had been charged or suspected of terrorism (they were not), they were confined in a federal detention facility, staffed by federal employees, and protected by federal law like any other detainee. As the court of appeals correctly explained, "[t]he reasons why plaintiffs were held at the MDC as if they were suspected of terrorism do not present the 'context' of their confinement." App.23a. Even more fundamentally, the complaint alleges that Petitioners *knew* there was no cause to treat Respondents as if they implicated national security. Officials cannot transform the nature of this case by their unilateral recharacterization of it.

### 3. Even If These Claims Presented A New "Context," A Remedy Should Be Available.

Even if this Court considered Respondents' claims to arise in a new *Bivens* context,it does not follow that they should fail. Rather, the Court follows a "familiar sequence" to determine whether to

recognize the cause of action. *Wilkie*, 551 U.S at 550. First, the Court asks whether any existing alternative remedy presents a convincing reason for the judiciary to stay its hand. *Id.* Second, "even in the absence of an alternative," the Court "must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Bush*, 462 U.S. at 378). At this step, the Court "weigh[s] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Id.* at 554.

Together, this inquiry assists the Court in determining how best to vindicate important constitutional interests in deterrence and compensation, while minimizing separation of powers concerns. *See* Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What is Special about Special Factors*, 45 Ind. L. Rev. 719 (2012). Where an alternative remedy is available, *see Minneci*, 565 U.S. at 127-30; *Schweiker*, 487 U.S. at 429, or where an implied damages remedy would intrude in an area uniquely committed to a coordinate branch or require difficult line-drawing, *see Chappell*, 462 U.S. at 301, separation of powers concerns are heightened. At the same time, an important part of the balance is effectuating the "core purpose" of *Bivens*: "deterring individual officers from engaging in unconstitutional wrongdoing." *Malesko*, 534 U.S. at 74.

### a) Alternative Remedies

This Court has indicated that an elaborate administrative scheme that provides "meaningful remedies" counsels against a *Bivens* remedy, because Congress is well positioned to weigh the costs and benefits of supplementing an existing scheme. *Bush*, 462 U.S. at 368, 388-90; *Schweiker*, 487 U.S. at 425. An implied damages remedy may also be unnecessary if there is an alternative, such as state tort law, providing "roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." *Minneci*, 565 U.S. at 130.

Petitioners do not identify any administrative scheme which could even theoretically have provided Respondents with meaningful remedies, and Respondents have no access to state torts because they would be foreclosed by the Westfall Act. *See id.* at 126 ("existence of an adequate 'alternative, existing process' differs dramatically" depending on employment status of the defendant, because "[p]risoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government"). It is thus clear that there is no alternative remedy that should cause the judiciary to refrain from recognizing a *Bivens* remedy here.

To the contrary, the *absence* of any opportunity for independent review counsels strongly in favor of finding a *Bivens* remedy here, suggesting that this is a particularly "meritorious case for recognizing a new constitutional cause of action." *Wilkie*, 551 U.S.

at 554; *Malesko*, 534 U.S. at 72-73. While federal prisoners usually have "access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program," *Malesko*, 534 U.S. at 74, Respondents allege that an important part of the scheme of abuse they faced was restrictions on filing administrative complaints and contacting the outside world, including attorneys.[7] *See* App.301a (¶140) (information on filing administrative complaints withheld); JA276-78; App.274a-275a (¶61); *see also* JA296-97 (detainees' ability to obtain and consult with attorneys "severely limited"); App.281a (¶79); JA222-23 (initial communications blackout); App.282a-287a (¶¶83-86, 92-97); JA247-55 (restrictions on legal calls); App.282a (¶¶81-82); JA224-30 (counsel given false information about location of detainees); JA389-91 (illegal audio-taping of attorney visits).

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[7] It is indisputable that neither the BOP's administrative remedy program nor the availability of a claim for injunctive relief or *habeas* presents a convincing reason for the judiciary to stay its hand under *Wilkie* step one. *See McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) (BOP's administrative remedy program is not an effective alternative scheme or a *Bivens* special factor), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731, 740 (2001); *Minneci*, 565 U.S. at 130 (asking if potential alternative remedy provides "roughly similar incentives" and "roughly similar compensation"); *Mitchell*, 472 U.S. at 523 n.7 (noting that for victims of a completed constitutional violation by the Attorney General, habeas or injunctive relief is "useless" as compared to damages remedy).

Judge Raggi assumed Respondents could have filed a *habeas* action to challenge the conditions of their confinement. App.116a. That is not settled as a legal matter, *see Aamer v. Obama*, 742 F.3d 1023, 1031-32 (D.C. Cir. 2014) (Supreme Court has "expressly" left "open" whether habeas applies "to conditions of confinement claims"), and Respondents were in any event constrained from pursuing *habeas* by Petitioners' misconduct. Indeed, when a few detainees gained access to counsel and filed habeas petitions to challenge their detention, the INS and FBI worked to clear those individuals ahead of detainees who had not filed legal actions, in order to avoid answering the petitions in federal court. JA198-201. The *only* remedy Respondents had access to were FTCA claims, and those could not address much of the alleged misconduct (like discrimination), and do not deter individuals. *Carlson*, 446 U.S. at 19-23.

Respondents thus "seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*." *Malesko*, 534 U.S. at 74.

**b) Common-Law Balancing**

Under the second step of the analysis, the Court "weigh[s] reasons for and against the creation of a new cause of action." *Wilkie*, 551 U.S. at 554. There are profoundly important reasons to ensure that federal prisoners abused in custody have a remedy, and no special factors counseling hesitation before recognizing one.

"The purpose of *Bivens* is to deter individual federal officers from committing constitutional

violations." *Malesko*, 534 U.S. at 70. In furtherance of that "core" purpose, this Court has extended *Bivens* "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally," and "to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Id.* at 70. While this Court has declined to further extend *Bivens* in recent years, it has not done so reflexively, but after careful analysis that affirms the vitality of *Bivens*' core functions of deterrence and compensation. *See, e.g.*, *Minneci*, 565 U.S. at 130 (considering whether state tort law remedies provide roughly the same deterrence and compensation as would a *Bivens* claim); *Meyer*, 510 U.S. at 485. Without a *Bivens* remedy available in cases such as this, future law enforcement officials would not be sufficiently deterred from engaging in blatant racial profiling or ordering torture in federal prisons in response to a real or perceived crisis.

The Court, in deciding whether to recognize a *Bivens* remedy, also considers "whether the type of injury sustained by the plaintiff is normally compensable in damages, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim." *Butz v. Economou*, 438 U.S. 478, 503 (1978); *see also Wilkie*, 551 U.S. at 562 (rejecting *Bivens* claim that would present difficulty in crafting a workable cause of action). There is no question that Respondents' injuries are normally compensable and within a court's core competencies. *See Davis*, 442 U.S. at 245; *Wilkie*, 551 U.S. at 556 (noting judiciary's expertise in "identifying the

presence of an illicit reason (in competition with others)," including regarding "claims of discrimination based on race or other characteristics"). Courts routinely award damages for equal protection and substantive due process violations. And striking the correct balance between deference to officials' efforts to ensure prison security and the constitutional rights of the imprisoned is an area of judicial expertise. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976) (establishing deliberate indifference standard).

On the other side of the ledger would be any "special factors counselling hesitation." *Wilkie*, 551 U.S at 550 (quoting *Bush*, 462 U.S. at 378). Petitioners' invocation of such special factors is misplaced—and far from sufficient to outweigh the need to deter future discrimination and abuse of the kind alleged here.

i. *"High-Level Policy Decisions."* DOJ Petitioners first argue that *Bivens* actions should be unavailable to challenge "high-level policy decisions" (Ashcroft Br. 23), even if clearly unconstitutional. This extraordinary theory makes no sense and has no support.

Petitioners quote *Malesko*'s observation that *Bivens* is not "a proper vehicle for altering an entity's policy," but they wrest those words from their context. Ashcroft Br. 24 (quoting *Malesko*, 534 U.S. at 74). The issue in *Malesko* was not whether *Bivens* applied to constitutional violations effectuated as a matter of policy, but to claims against a non-public entity. 534 U.S. at 63. Indeed, the Court explicitly stated that *Bivens* is an appropriate way to deter a

federal officer's unconstitutional actions, "*no matter that they . . . are acting pursuant to an entity's policy.*" 534 U.S. at 70 (emphasis added).[8]

The danger of this proposed "special factor" is palpable. If a future Attorney General orders his subordinates to confine all Muslim prisoners to extreme isolation, or deprive all Jewish prisoners of access to kosher food, he would be setting "policy"—but he also would be a federal officer violating clearly established constitutional rights. Petitioners' approach would leave undeterred officials with the power to wreak the most constitutional harm on the greatest number of people. Moreover, a "high-level policy" exception would raise vexing questions about when a clearly unconstitutional law enforcement action crosses the line and becomes a clearly unconstitutional policy, and what separates "high" and "low"-level policy.

If anything, it is *more* vital to our system of government to ensure accountability when it is high-ranking officials who order clearly unconstitutional treatment. *See Butz*, 438 U.S. at 506 ("Extensive Government operations offer opportunities for unconstitutional action on a massive scale."); *United*

[8] Petitioners also rely on two circuit court decisions—including one from the same circuit that rejected their proposed "policy decision" exception to *Bivens*. Ashcroft Br. 24-25 (citing *Arar*, 585 F.3d at 578; *Vance*, 701 F.3d at 205). Though both courts questioned the appropriateness of using *Bivens* to challenge high-level policy, their holdings turned on separation of powers concerns, such as the military chain of command, and the potential need to second-guess the good-faith nature of a foreign country's assurances that a transferred detainee would not be tortured. *Vance*, 701 F.3d at 199-200; *Arar*, 585 F.3d at 578.

*States v. Lee*, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."). Yet barring *Bivens* suits for clearly unconstitutional policies would effectively grant high-ranking officials absolute immunity, effectively overturning *Mitchell*, 472 U.S. at 520-24.[9]

Petitioners' only justification for their novel exception to Bivens is that high-level "policies are more likely to be amenable to judicial review under the Administrative Procedure Act," and receive scrutiny from non-judicial sources, like the OIG and Congress. Ashcroft Br. 24. Notably absent is a concession that the temporary policies at issue here *would* have been amenable to APA review as "final agency action," a result Petitioners took care to prevent by avoiding a paper trail. App.265a (¶39); JA97, 175-177.

Neither can Petitioners show that unconstitutional policies will receive sufficient public attention to overcome the lack of accountability before the judiciary. They cite the OIG Report as an example, but that report was motivated by, among

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[9] Petitioners argue that there is no connection between the "special factors" analysis and official immunity. Ashcroft Br. 26 (citing *Stanley*, 483 U.S. at 684-85). While the doctrines are distinct, they certainly overlap, particularly with respect to their focus on deterrence. *See Mitchell*, 472 U.S. at 522-23, 523 n.7. Moreover, this Court has previously recognized the relationship between the decision of whether to recognize a cause of action and to apply immunity, finding that an award of absolute immunity could result in the Court's approval of a cause of action being "drained of meaning," *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978) (citation omitted).

other things, *this lawsuit* (JA46 n.4). And the OIG's supplemental investigation into physical and verbal abuse at MDC was initiated after several detainees reported discrete instances of physical abuse. JA346-347. The OIG's mission is to investigate allegations of waste, fraud, and abuse in DOJ programs and personnel; there is no evidence it favors investigation into unlawful policy over investigation into individual illegal acts. Moreover, even if Respondents had access to an APA claim, or could expect attention from Congress or the OIG, this Court has never treated such uncertain possibilities as substitutes for *Bivens* liability, without a showing that they would provide adequate deterrence and compensation. *See Minneci*, 565 U.S. at 127-30; *cf. Mitchell*, 472 U.S. at 523 n.7.

The legitimate public interest in protecting government officials acting in good faith in a time of crisis is fully protected by qualified immunity, whatever the official's rank. If clearly unconstitutional acts of a single prison guard against a single prisoner are redressable in court, it cannot be the case that a clearly unconstitutional policy, one that affects hundreds or thousands of people, is not.

ii. *Immigration.* Petitioners next argue that the high-level policy in this case "implicate[s] both national security and immigration," into which the courts should be reluctant to intrude. Ashcroft Br. 18. But the political branches' plenary power over the exclusion and removal of non-citizens is not *carte blanche* to arbitrarily punish or mistreat detainees in federal custody pending removal.

It is well-established that non-citizens present in this country, even those who have violated immigration law, are protected by the Constitution's guarantees of equal protection and due process. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Wong Wing v. United States*, 163 U.S. 228 (1896). "These provisions are universal in their application to all persons within the territorial jurisdiction . . . and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Because non-citizens, like citizens, have a constitutional right to be free from mistreatment in government custody, the Court must determine whether there is a reason to deprive them of a remedy it has provided to citizens in the same setting. Petitioners invoke the plenary power over immigration, but Respondents do not challenge their detention or removal, only their conditions of confinement. The Court need not grapple with the question of implying a damages remedy for constitutional violations concerning the Executive's immigration powers or with the relevance of the INA, *cf. Mirmehdi*, 689 F.3d at 982; *De La Paz*, 786 F.3d 367, as the INA does not regulate detention conditions much less provide a remedy for them. Petitioners cannot explain how plenary power or the INA's "intricate remedial scheme" has any bearing on the claims in this case.

Petitioners make the conclusory assertion that because the challenged conditions of confinement "applied only to aliens . . . detained for apparent

violations of U.S. immigration laws," "[t]he principles undergirding courts' reluctance to infer *Bivens* remedies in other immigration-related cases apply with full force." Ashcroft Br. 30. That simply does not follow. Immigration law may have been the original reason for Respondents' detention (even though Petitioners ordered their removal delayed). App.269-270a (¶¶53-55). But immigration law had nothing to do with the harsh conditions of confinement Respondents suffered at a Bureau of Prisons facility. It is long-established that non-citizens can be excluded or expelled, and detained "as part of the means necessary to give effect" to their removal, but just like citizens, they have the right to be free from punishment without due process of law. *Wong Wing*, 163 U.S. at 235; *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.").

Given the robust role of the judiciary in reviewing constitutional violations against non-citizens outside the context of entry and exit, and given that citizens have a remedy for comparable rights violations, there is no reason to deny that remedy to non-citizens. Indeed, if any law enforcement practice against out-of-status non-citizens is inappropriate for damages because it "implicates immigration," there is nothing to deter rogue officers from engaging in routine unconstitutional treatment of non-citizens. Foreign relations interests run the other way; the "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of

American citizens abroad." *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *see also Vance*, 701 F.3d at 203 ("It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries . . . .").

iii. *National Security.* Nor does the fact that Respondents were non-citizens arrested in connection to a terrorism investigation counsel hesitation in recognizing a *Bivens* remedy. Petitioners' argument to the contrary expands this Court's "special factors" analysis beyond its breaking point, and ignores Respondents' well-pleaded allegations. Their position is less an argument rooted in *Bivens* jurisprudence, and more an appeal to disregard the complaint and assume Petitioners should win on the merits.

Petitioners suggest that incantation of the magic phrase "national security" triggers complete judicial deference. But they disregard this Court's warning that "the label of 'national security' may cover a multitude of sins." *Mitchell*, 472 U.S. at 523. Indeed, "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* (citation omitted). The need for *Bivens* remedies in this context is more powerful, not less.

In support of their plea for extreme deference, Petitioners cite two decisions of this Court that are inapposite. In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Court held that the President, as Commander-in-Chief, has authority "to classify and

control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch." *Id.* at 527. The Court reasoned that security clearance "may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States," and a "predictive judgment" of this sort "must be made by those with the necessary expertise in protecting classified information." *Id.* at 528-29. Similarly, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court endorsed the Executive's power to revoke the passport of an American citizen conceded to be causing or likely to cause "serious damage to the national security or foreign policy of the United States." *Id.* at 287. Neither case suggests that the Executive should have the unreviewable authority to respond to a crisis by singling out a discrete group, on grounds of race or religion, for harsh treatment. There is a different case supporting that proposition—but Petitioners tellingly fail to cite it. *See Korematsu v. United States*, 323 U.S. 214, 219 (1944) ("we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal"); *infra* pp. 71-72.

When this Court has addressed national security in the *Bivens* context, it has limited itself to the discrete sphere of the military, and based its decision on the explicit constitutional commitment of military affairs to non-judicial regulation. *Chappell*, 462 U.S. at 300-304; *Stanley*, 483 U.S. at 681 (disallowing "*Bivens* actions whenever the injury arises out of activity 'incident to service,'" but expressly reserving

the possibility of *Bivens* claims by servicemembers against military officials not incident to service). Separation of powers concerns counsel significant hesitation before interfering with the military chain-of-command; it does not compel judicial abstention when immigration violators who share a particular ethnicity or religion are mistreated in a federal prison.

Petitioners cite several circuit decisions expanding upon *Chappell* and *Stanley* to bar *Bivens* claims arising from military detention. Ashcroft Br. 24-27. Regardless of whether these cases are correctly decided, they rest on the special concerns of military detention, and thus involve no analysis of whether national security concerns might counsel against recognizing a *Bivens* remedy for abuse in a federal prison. *See Lebron*, 670 F.3d at 550 ("Padilla's enemy combatant classification and military detention raise fundamental questions incident to the conduct of armed conflict . . . ."); *Vance*, 701 F.3d at 199-200 (judicial inquiry into abuse in military detention, in an active zone of combat, risks interference with the military chain of command); *see also Doe v. Rumsfeld*, 683 F.3d 390, 395 (D.C. Cir. 2012) (identifying separation of powers concerns raised in "military detainee cases").

In contrast, Respondents challenge abuse in civil detention, under the authority of the Department of Justice, where conditions are normally subject to judicial review. *See Carlson*, 446 U.S. at 19. Petitioners imply that Respondents' treatment, like the treatment of military detainees, is nevertheless outside the expertise of the federal courts because

evaluating the legality of subjecting "*certain detainees*" arrested "during the September 11 investigation to restrictive conditions" requires considering the entire history of al Qaeda in America. Ashcroft Br. 27-28 (emphasis added). Given that Respondents were "connected to the 9/11 investigation" not based on any potential evidentiary link or individualized security analysis, but rather due to their race, religion, ethnicity and immigration status, we have no such concerns about the Court's competence. *See infra* pp. 52-54.

Petitioners' basic response is to disagree with the allegations in the complaint and insist that they were merely "err[ing] on the side of caution so that a terrorist would not be released by mistake." Ashcroft Br. 29 (quoting JA128). As an initial matter, this case is not about the lawfulness of Respondents' continued detention. The "cautious" decision Petitioners allegedly made was to confine immigration detainees, who could have been detained in different conditions (or removed from the country), in the harshest conditions available. Petitioners are alleged to have made this decision despite *knowing* that there was no basis, apart from illegitimate racial and religious stereotypes, of suspecting them of terrorism. Petitioners, of course, say they did not know this. Ashcroft Br. 29. If Petitioners' knowledge is not adequately pleaded, they could prevail on that ground. *But see infra* Section I.B. Likewise, if they are right that blatantly discriminatory treatment of Arabs and Muslims was reasonable in the aftermath of 9/11, they could prevail on qualified immunity grounds. *But see infra* Section I.C. But if they are wrong, and if

Respondents have alleged clearly unconstitutional treatment knowingly directed by Petitioners, any force their "national security" argument might otherwise have must evaporate.

Essentially, Petitioners argue that judicial review of an individual who is treated *as if* he raises national security concerns, will itself raise national security concerns, no matter that neither evidence nor reason supports the treatment. This circular logic threatens the rule of law. What follows is that every human being in the country, and especially every Muslim non-citizen, can be treated as a terrorist until they prove the negative, without the opportunity for judicial review. This backwards view of the Constitution cannot immunize from liability clear constitutional violators.

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It is important to remember that recognition of a *Bivens* cause of action does not guarantee a plaintiff victory, or even success on a motion to dismiss or for summary judgment. The import of Petitioners' argument is that no remedy is available *even if* their conduct was so clearly unconstitutional that they should have known it was impermissible at the time. The message of such a ruling would be clear: high-ranking law enforcement officials may deliberately decide to violate the Constitution without fear of accountability.

This Court should not send such an extraordinary message. Federal detainees, abused on U.S. soil by a civilian law enforcement agency in clear violation of the Constitution, must have their day in court.

### B. Respondents' Detailed Factual Allegations State Plausible Claims.

DOJ Petitioners argue that Respondents have failed to plead plausible constitutional claims. Their arguments are based on a misreading of this Court's precedent and a failure to engage with the complaint's actual allegations.

It is a fundamental tenet of American jurisprudence that the federal courthouse doors should be easy to enter, with just a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2); *see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (requirement of factual detail would be "impossible to square . . . with the liberal system of 'notice pleading'"); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513-14 (2002) (discovery and summary judgment, not heightened pleading requirements, are the proper means to adjudicate merit).

Notice pleading remains the rule, but under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Iqbal*, 556 U.S. at 678-79, courts now follow two steps. First, while factual allegations are taken as true, mere conclusory statements that mirror the elements of a cause of action are not. *See Twombly*, 550 U.S. at 555. Second, with the factual allegations treated as true, courts consider whether the claim to relief has "facial plausibility." *Iqbal*, 556 U.S. at 679.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. This does

not mean that a plaintiff must show that her claims are *more* plausible than any other possible explanation for the facts alleged. *See id* ("The plausibility standard is not akin to a 'probability requirement.'" (quoting *Twombly*, 550 U.S. at 556)); *see also Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 324 (2007) (holding that, even under the heightened pleading requirement of the Private Securities Litigation Reform Act, an inference of scienter need not be "the *most* plausible of competing inferences" (emphasis added; citations omitted)).[10] Even if the claim seems "improbable" and ultimate recovery "remote and unlikely," it still survives a motion to dismiss. *Twombly*, 550 U.S. at 556.

Key to understanding how *Twombly* and *Iqbal* permit complaints to survive when there are multiple "plausible" accounts (some lawful and some unlawful) is the role of inferences. Inferences are rarely conclusive. *Twombly* and *Iqbal* do not require a complaint to provide conclusive inferences to be plausible. There is always some alternative explanation; that is why cases are brought to the courts, for a decision among alternatives.

Petitioners would upend these longstanding principles. They imagine that this Court, in *Iqbal*, "refused to credit" assertions of discriminatory

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[10] Lower courts have adhered to this rule. *See, e.g., Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) ("A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible." (citation and alterations omitted)).

motive because the Court viewed the plaintiff's "*assertions* [as] implausible in light of 'more likely explanations.'" Ashcroft Br. 41-42 (emphasis added; citation omitted). But *Iqbal* refused to credit those assertions because they were conclusory—not because alternative explanations were more probable. 556 U.S. at 681. What must be "plausible" is the plaintiff's *claim for relief*, not her factual allegations, of which courts must "assume the[] veracity." *Id.* at 678-79; *see also Twombly*, 550 U.S. at 555 (plausibility of the claim is judged "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"). Thus, a factual allegation or reasonable inference must be accepted as true, even if an alternative explanation appears more likely. [11]

Petitioners' erroneous application of *Iqbal* stems from their conflation of the first step of the inquiry—determining whether allegations are factual or conclusory—with the second inquiry, which is whether a legal claim to relief is plausible given the factual allegations and appropriate inferences. Where Mr. Iqbal relied on conclusory assertions, Respondents have supplied detailed factual allegations. These must be taken as true, and when

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[11] Petitioners repeatedly contradict this principle, for example, claiming that Mr. Iqbal had no "*plausible* allegation" linking petitioners to his placement in the ADMAX SHU based on race, religion or national origin. Ashcroft Br. 41 (citing *Iqbal*, 556 U.S. at 682-83) (emphasis added). What was missing in *Iqbal* was a *factual* allegation, not a *plausible* allegation. 556 U.S. at 682-83. *Amici* follow suit, with the jarring assertion that Rule 8 requires sufficient facts to "infer that the allegations of the complaint are true." Barr Br. 27.

they are, Respondents have stated a plausible claim to relief.

### 1. Respondents Adequately Allege Constitutional Violations From The Outset Of DOJ Petitioners' Policy.

DOJ Petitioners violated two constitutional rights: (1) equal protection, by intentionally discriminating against Respondents on the basis of race, religion, and ethnicity, and (2) substantive due process, by imposing on Respondents harsh and punitive conditions of confinement.

a. *Equal Protection.* Respondents allege that nearly 500 Muslim, Arab, and South Asian detainees were arrested in the New York area and held in connection to the terrorism investigation, even though all were eventually cleared of any connection to 9/11. App.252a-253a, 261a-262a (¶¶2, 29, 31). These allegations, the latter of which was absent from the complaint in *Iqbal*, on their own suggest an equal protection violation, as a "clear pattern, unexplainable on grounds other than race." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Yick Wo*, 118 U.S. at 374. But Respondents have alleged much more.

Ashcroft created and implemented a policy of rounding up and detaining Arab and South Asian Muslims to question them about terrorism, while deliberately avoiding a paper trail. App.265a (¶39). Ashcroft told Mueller to direct the FBI to question any male between 18 and 40 from a Middle Eastern country and to tell INS to round up every

immigration violator who fit that profile, even though he was aware this would result in the arrest of many individuals who had no connection to terrorism. App.265a (¶41). Mueller complied, directing all tips investigated, even those based solely on religion, ethnicity, national origin or race, contrary to prior law enforcement practice. App.265a (¶40). They received detailed daily reports of the detentions, and were aware that the FBI had no information connecting Respondents to terrorism prior to identifying them as "of interest" to the 9/11 investigation. App.267a-268a (¶47). These non-conclusory allegations must be taken as true. Taken as true, they plausibly suggest discrimination.[12]

Additional factual allegations amplify the inference of discriminatory intent. For example, Ashcroft made public statements criticizing Islam as compared to Christianity. App.272a-273a (¶60.d.). Petitioners used racial, religious and national origin profiling in other enforcement contexts in the aftermath of 9/11. App.273a-274a (¶60.f.). And notably, Petitioners' hold-until-cleared policy for minor immigration violators was contrary to law and historical practice. App.269a (¶51).

This policy of discrimination led, predictably, to discriminatory acts. Mueller admitted that there was no guidance or policy to determine whether a detainee was of interest, App.267a (¶45), leaving agents to follow Petitioners' direction to focus only on

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[12] *Amici* state the "OIG Report concluded that the DOJ Petitioners did not direct anyone to engage in the mass incarceration of aliens from the Middle East . . . ." Barr Br. 20. Tellingly, there is no citation for this assertion.

individuals who were Arab, South Asian, or Muslim. As a result, the FBI's New York field office considered an individual's Arab appearance and Muslim beliefs as relevant factors in conducting the post-9/11 investigation. App.266a (¶42). Such detainees were consistently treated differently than similarly situated detainees. App.266a-267a (¶43) (detailing examples of differential treatment of detainees who did not fit profile).[13]

According to DOJ Petitioners, these allegations are "functionally identical" (Ashcroft Br. 41; Ziglar Br. 28-29) to the two factual allegations identified in *Iqbal*, *i.e.*, that (1) Mueller directed the arrest of thousands of Arab Muslim men, and (2) Ashcroft and Mueller approved the policy of holding post-9/11 detainees in highly restrictive conditions. *Iqbal*, 556 U.S. at 681. Not so. Decisive in *Iqbal* was the absence of factual allegations linking DOJ Petitioners to the decision to subject Muslim and Arab detainees *without suspected ties to terrorism* to restrictive conditions. 556 U.S. at 682-83. Without this fact, Mr. Iqbal's allegations were "consistent with" unlawful discrimination, but they could not "nudge[]" the claim to plausibility, at least absent additional allegations showing Petitioners' discriminatory intent. *Id.* at 681, 683.

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[13] Respondents' experiences confirm the role of race and ethnicity in the investigation. *See* App.302a, 306a (¶¶143, 158) (Abbasi and Mehmoud arrested based on tip about "male, possibly Arab"); App.318a (¶195) (Khalifa arrested based on tip about several Arabs who were renting a post-office box); App.328a (¶230) (Bajracharya arrested based on tip about "Arab male" videotaping outside a building that contained, among many other offices, the DA's office and an FBI office).

Mr. Iqbal tried to allege discriminatory intent, but the Court disregarded as conclusory his allegations that Petitioners had subjected him to harsh conditions of confinement as a matter of policy "because of" his race, religion and national origin. *Iqbal*, 556 U.S. at 680-81. The Court did so not because this allegation was "unrealistic or nonsensical," but because it amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 681 (quoting *Twombly*, 550 U.S. at 555).

It was only after concluding that Mr. Iqbal's factual allegations were merely *consistent* with discrimination that the Court then turned to the alternative lawful explanations that might explain the set of events detailed in Mr. Iqbal's complaint. *Id.* at 682. The Court emphasized that it was considering this alternative in light of Mr. Iqbal's specific failure to adequately allege discriminatory intent. *Id.* ("*On the facts respondent alleges* the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." (emphasis added)).

Respondents amended their complaint in light of the Court's decision in *Iqbal*. Based on years of discovery, they were able to allege what was missing in *Iqbal*: a policy by DOJ Petitioners to target Muslims and Arabs regardless of whether there was a legitimate reason to suspect them of ties to terrorism, and an instruction to isolate such individuals and subject them to harsh restrictions.

App.265a, 267a-268a, 274a-276a (¶¶39-41, 44-47, 61-62, 67).[14] These allegations raise the inference of discrimination, thus there is no opportunity to consider alternative nondiscriminatory explanations. To do so would be to weigh the likelihood that Respondents' allegations are true against the likelihood that they are false. It would impose the probability requirement this Court squarely rejected in *Iqbal*.

DOJ Petitioners could not, and so do not, argue that Respondents' detailed allegations are conclusory. Instead they simply pretend they do not exist (for example, never addressing paragraphs 39, 40, 46, 48, 61, and 62 of the complaint). Because Respondents' non-conclusory allegations establish what was missing in *Iqbal*—discriminatory intent—the equal protection claim must survive.

b. *Substantive Due Process.* Respondents also allege substantive due process violations, an independent claim not addressed in *Iqbal* that survives even if a discriminatory motive has not been adequately pled.

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[14] Moreover, unlike Mr. Iqbal, Respondents do not allege that they were placed in restrictive confinement based on a law enforcement officer's determination that they were of "high interest" to the terrorism investigation. *Iqbal*, 556 U.S. at 682-83. No such determination was made for many detainees held in the ADMAX SHU. App.252a-254a (¶¶1, 4). Ziglar misses the distinction. He points to Mr. Iqbal's allegation that "government officials" subjected him to restrictive confinement though he lacked a connection to terrorism, without acknowledging that this fails to link Petitioners to the decision, a failing that does not exist in Respondents' complaint. Ziglar Br. 28.

Respondents were held between three and eight months in conditions designed for the most dangerous convicted criminals in the federal prison system—even though there was no reason to suspect Respondents of anything beyond immigration violations. When a "restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. Arbitrary placement of a civil detainee in prolonged isolation states a due process violation. *See id.* at 539 n. 20.[15]

Respondents' factual allegations support the reasonable inference that DOJ Petitioners caused Respondents to be placed in isolation. Ashcroft and his small working group instructed that Respondents be restricted from contacting the outside world, App.274a-275a (¶61), and such restriction could only be accomplished by placement in a Special Housing Unit. The OIG Report confirms this fact. *See* JA72 (BOP Director reporting that "the Department [of Justice] wanted the BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC"). It also confirms that the Attorney General's office was in direct communication with the BOP about how the BOP

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[15] *See also Iqbal v. Hasty*, 490 F.3d 143, 168-69 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 662 (2009); *Stevenson v. Carroll*, 495 F.3d 62, 68-69 (3d Cir. 2007); *Magluta*, 375 F.3d at 1274-76; *Brown-El v. Delo*, 969 F.2d 644, 648 (8th Cir. 1992).

could isolate detainees. JA221-22. Because Respondents sufficiently allege that Petitioners intended to restrict communications, and because government officials routinely accomplish such restrictions through placement in isolation, it is reasonable to infer that Petitioners intended for Respondents to be placed in restricted housing.

Respondents' allegations further support the conclusion that DOJ Petitioners intended for Respondents to be treated harshly. Petitioners "mapped out ways to exert maximum pressure" on the detainees. App.274a-275a (¶61). They "decided to spread the word among law enforcement personnel that the 9/11 detainees were *suspected terrorists, or people who knew who the terrorists were,* and that they needed to be encouraged in any way possible to cooperate." *Id.* (emphasis added).

This description of Respondents was false, and Petitioners knew it to be false. DOJ Petitioners knew that their profiling policy "would result in the arrest of many individuals about whom they had no information to connect to terrorism." App.265a (¶41). More specifically, they were aware that the FBI had no information connecting Respondents to terrorism prior to identifying them as "of interest" to the 9/11 investigation. App.267a-268a (¶47). By misrepresenting Respondents' status to subordinates, and calling them "suspected terrorists," Petitioners ensured that Respondents would be detained in the harshest conditions that exist in the federal system.

It is plausible to conclude that Petitioners anticipated and intended this natural result of their

actions. Indeed, because Petitioners intended for the conditions to be an aid for interrogation, App.275a (¶65), it is more than merely speculative that they were intended to be isolating and harsh. Even if other inferences could be drawn, plausibility is all that *Iqbal* requires for pleading intent. *See, e.g.*, *Twombly*, 550 U.S. at 556.

Thus, the complaint's detailed factual allegations and the reasonable inferences they support, taken as true, state plausible claims of equal protection and substantive due process violations, which began when Petitioners crafted their policy of holding Muslim men of Arab or South Asian descent in highly restrictive conditions. Although the court of appeals focused on later events as giving rise to the constitutional violations, this Court may affirm on any ground, including one rejected by the court below. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989). In concluding that Respondents' original theory was insufficient, the Second Circuit made two mistakes.

First, the court focused on the fact that DOJ Petitioners did not create the particular conditions in question. App.31a. But Petitioners can be liable for ordering detainees to be held in isolation and subjected to restrictive conditions for arbitrary or discriminatory reasons, even if they did not design the details of the mistreatment. *See supra* pp. 54-57.

Second, the court thought that Respondents had failed to plead that Ashcroft's initial policy required restrictive conditions for detainees in the absence of individualized suspicion of terrorism. App.31a. *But see* App.265a-267a, 274a-275a (¶¶39-41, 43-46, 61).

The court seems to have based this conclusion on a September 22 order by INS official Michael Pearson, which instructed INS agents to limit arrests to aliens in whom the FBI had an "interest." App.17a. Yet earlier orders by the same official make clear that INS was arresting individuals without knowing the basis of the FBI's "interest," JA109, and even Pearson's updated order did not bind the FBI to make its "interest" determinations on legitimate grounds, JA107-108. The September 22 order was issued precisely because "many of the people arrested . . . might not have a nexus to terrorism," JA109-10, reflecting an awareness that arrests were being made on the basis of religion, race and ethnicity. App.266a-267a (¶42-44).[16]

Third, the court relied on the fact that the New York field office operated differently from other areas, App.17a, but there is no indication it acted in violation of orders from headquarters. Instead, the allegations establish both that New York was the focal point of the investigation and that FBI headquarters directed all of the field offices, including New York's, with Mueller in daily contact with the field offices. App.270a-271a (¶¶56-57); JA64, 75, 112-13, 118-20). Even at this early period, before merger of the New York list described below, "it soon became clear that many of the September 11 detainees had no immediate apparent nexus to terrorism." JA113. The Justice Department and FBI ordered the detainees to be treated as "of interest" regardless. JA114. For example, on

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[16] Indeed, Benatta and 84 other detainees were arrested before the relevant orders. App.311a (¶174); JA76.

October 2, 2001, FBI headquarters sent an electronic communication to the New York Field Office asking if the FBI had an investigative interest in Abbasi, Benatta, and other detainees, *and asking it to describe the basis for the initial interest.* App.304a, 315a (¶¶149, 186) (emphasis added). Despite the New York Field office's failure to respond with any articulation of any investigative interest, FBI headquarters treated them as "of interest." App.304a-305a, 315a-316a (¶¶149-151, 187-89).

Thus, the OIG evidence relied upon by the court of appeals corroborates, rather than conflicts with, Respondents' allegations of an initial and purposeful policy to target Muslims and Arabs for mistreatment, without regard to evidence of ties to terrorism.

### 2. At A Minimum, Respondents State A Claim Based On The Merger Of The New York List.

Even though it incorrectly rejected the above theory, the Second Circuit properly found that Respondents had stated plausible claims for relief based on events relating to Petitioners' decision to merge a list of New York detainees with the national 9/11 detention list.

As the court of appeals explained, Respondents alleged that detainees in New York were being held in restrictive conditions of confinement, and that the only thing tying these detainees to terrorism was their religion and ethnicity. App.31a-32a. Knowing these facts, Petitioners authorized (Ashcroft) or condoned (Mueller and Ziglar) a decision to merge the New York and national detainee lists, thus

ensuring that Respondents and other New York detainees would remain in restrictive confinement, for no legitimate reason. *Id.*

Petitioners deride the court's analysis as based on speculative "premises." Ashcroft Br. 44. Not so: it was based on factual allegations and reasonable inferences—ones not present in *Iqbal*—which must be "accepted as true." *Iqbal*, 556 U.S. at 678.

First, Petitioners flatly reject paragraph 47 of the complaint: that Ashcroft, Mueller and Ziglar learned in October that the New York field office of the FBI was keeping a list of noncitizens, including Respondents, for whom the FBI had not asserted any interest or lack of interest, and against significant internal criticism Ashcroft ordered all these detainees treated as "of interest" to the 9/11 investigation, and Mueller and Ziglar complied. App.267a-268a (¶47).

Petitioners agree with Judge Raggi, "that nothing but pure speculation" links Ashcroft to the decision to merge the lists. Ashcroft Br. 45. *But what links Ashcroft to the decision is Respondents' factual allegation saying he made the decision.* Petitioners characterize the allegation as conclusory, *id.*, but it is plainly not. Determining whether an allegation is factual or conclusory does not depend on whether the truth of the allegation is merely possible or something more. *See Twombly*, 550 U.S. at 555. The claim that Petitioner Ashcroft ordered that the lists be merged is indisputably factual in the classic sense: it can be verified or not through typical means of proof. It is no different from the allegation (found to be factual, not conclusory, in *Iqbal*) that

Petitioners Ashcroft and Mueller approved the policy of holding post-9/11 detainees in highly restrictive conditions of confinement until cleared by the FBI. *Iqbal*, 556 U.S. at 681.

What DOJ Petitioners really appear to argue is that the factual allegation is *contradicted* by the OIG Report, which states that Deputy Attorney General Levey decided to merge the lists. Ashcroft Br. 45. But there is no conflict; taking Respondents' allegations as true, one can fairly infer that Levey made the decision to merge the lists based on an instruction from Ashcroft to do so. Moreover, even if there were a conflict, Respondents do not incorporate OIG conclusions that contradict the complaint. *See* App.6a, n.6.

The court of appeals' second "premise" was that Petitioners knew the FBI had not developed any connection between some of the detainees and terrorism. App.36a. This too is a factual allegation, found in paragraph 47 of the complaint. App.267a-268a (¶47). It must be accepted as true even without corroboration, but it is nonetheless strongly supported by the OIG Report. App.36a (citing JA102-06, 150-51, 218-19, 292) (New York FBI arrested all out-of-status aliens encountered—even coincidentally—in the course of investigating 9/11 leads); App.37a (citing JA109-110, 113-14) (DOJ Petitioners learned what the New York office was doing within weeks). Also supporting this "premise" are the details in the complaint regarding Ziglar's detailed daily reports to Ashcroft on persons arrested and other developments of interest, App.275a (¶¶63-64), and the requests from FBI headquarters to the

field office asking for *any* articulation of interest in Respondents, *see, e.g.*, App.304a (¶149).

DOJ Petitioners find these factual allegations "[un]likely" given the Pearson orders discussed above. Ashcroft Br. 46. But Petitioners cannot reject Respondents' factual allegations (*e.g.*, App.267a-268a, 275a (¶¶47, 63-64)), in favor of their own inferences. Even if unlikely, the allegations must be taken as true. *Twombly*, 550 U.S. at 555. Moreover, as explained above, *supra* pp. 57-58, the Pearson orders support Respondents' allegations that many detainees were arrested without any articulable interest.

Petitioners argue that they could not have known without further investigation whether detainees were connected to the terrorist attacks (Ashcroft Br. 46), but that does not change the fact that they knew there was *no* articulable basis to suspect Respondents. That they could not disprove a hypothetical connection to terrorism—one which there was no reason to hypothesize in the first place—does not meaningfully distinguish Respondents from any immigration detainee in federal custody. Petitioners knew the FBI had expressed no interest in detainees on the New York list; the decision to keep them in restrictive conditions anyway could only be justified by their race, religion, and national origin. Indeed, Petitioner Ziglar makes no apology for this disparate treatment, stating that he knew that "the persons on the New York List shared the same national origin, race, and religion with the 9/11 attackers," as if that

is sufficient on its own to justify their harsh treatment. Ziglar Br. 30-31.

Third, Petitioners cite Judge Raggi's dissent, which argued that the complaint raises only "a possibility" that DOJ Petitioners learned of the challenged conditions in the ADMAX SHU. *See* Ashcroft Br. 46 (citing App.132a-135a). But Respondents alleged that Mueller ran the investigation out of FBI Headquarters, and all three received detailed, daily reports of the arrests and detentions. App.33a (citing App.267a-268a, 275a (¶¶47, 63-65)). Based on these facts, it was reasonable to infer that DOJ Petitioners knew of the restrictive conditions of confinement at the MDC. While that is sufficient at this stage, the court of appeals went further and noted corroborating evidence in the OIG Report. App.33a-34a (citing JA45, 46, 72, 73, 221). Given the unusually close attention Petitioners paid to detainees such as Respondents, it was not just plausible to conclude that they knew of the conditions—it would have been "implausible [that] they did *not*" know. App.38a (emphasis altered). Moreover, the fair inference raised by the complaint is that Petitioners knew, and intended, that the detainees would be placed in isolation. App.274a-275a (¶¶61, 65).

Petitioners also attempt to refute their knowledge of the challenged conditions—conditions *necessary* to implement their plan of isolation—by claiming that the list-merger decision "merely preserved the pre-merger status quo, in which the majority of detainees from the New York List remained in far-less-restrictive conditions at the Passaic County Jail."

Ashcroft Br. 46-47. This argument disregards Respondents' allegations that Petitioners intended Respondents to be held in as restrictive conditions as possible, despite the absence of any evidence linking them to terrorism. App.265a, 274a-275a (¶¶41, 61). Not all detainees could be held in the ADMAX SHU because of space limitations, but that just means resource constraints limited the implementation of Petitioners' policy. App.276a (¶66). That some detainees, by fortuity, escaped the brunt of the punitive conditions ordered by Petitioners is no defense against claims brought by the rest.

Based on these factual allegations and the inferences drawn from them, the court of appeals concluded that Petitioners' decision to merge the lists, knowing that there was no reason to suspect the detainees of any connection to terrorism, and knowing of the restrictive conditions at the MDC, plausibly suggests punitive intent. App.44a. DOJ Petitioners offer no argument against this conclusion, stating only that *discriminatory* intent cannot be fairly inferred. *See* Ashcroft Br. 47-49. Nor could they; absent some non-race-based reason to suspect terrorism, the ADMAX SHU conditions were arbitrary and purposeless. App.47a. The allegations that Petitioners knowingly subjected Respondents to such arbitrary and purposeless conditions states a plausible claim of a substantive due process violation.

The court of appeal's approach to equal protection largely flowed from this same analysis. The court emphasized Respondents' factual allegations regarding the ways in which the New York FBI field

office relied upon race, religion and ethnicity, and that these practices were brought to the attention of DOJ Petitioners. App.61a-62a (citing App.266a, 328a (¶¶42, 230)); App.63a (citing App.267a-268a, 271a, 275a (¶¶45, 47, 57, 63-64)); *see also* JA102-105. In ordering or condoning the merger of the lists, DOJ Petitioners actively participated in the New York field office's discrimination, allowing an inference that Petitioners' themselves acted with discriminatory intent. App.64a (citing *Iqbal*, 556 U.S. at 683).

Petitioners argue that discriminatory intent cannot be inferred because of the presence of an obvious alternative explanation: the lists were merged because of the concern that a dangerous individual might otherwise be unwittingly released. Ashcroft Br. 48. As an initial matter, this case has nothing to do with release; the decision before Petitioners was whether to hold Respondents in the general population of the prison, or to expose them to uniquely harsh treatment in solitary confinement, despite suspecting them of nothing beyond overstaying their visa.

More fundamentally, Petitioners' argument implies that "once national security concerns become a reason for holding someone, there is no need to show a connection between those concerns and the captive other than that the captive shares common traits of the terrorist: illegal immigrant status and a perceived Arab or Muslim affiliation." App.44a. The court of appeals was correct to reject this discriminatory notion. It "rests on the assumption that if an individual was an out-of-status Arab or

Muslim, and someone called the FBI for even the most absurd reason, that individual was considered a possible threat to national security. It presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact." App.45a.

Petitioners object that this ignores *Iqbal's* distinction between "taking an action '*because of* its 'adverse effects upon an identifiable group' and doing so '*in spite of* such effects." Ashcroft Br. 48 (quoting *Iqbal*, 556 U.S. at 677). But as the court of appeals correctly recognized, the choice to treat the "interest undetermined" detainees as people of interest to the 9/11 investigation amounts to more than knowledge and acquiescence to subordinate discrimination; DOJ Petitioners joined in the discriminatory approach described by the panel above. *See also* App.64a (citing *United States v. City of New York*, 717 F.3d 72, 94 (2d Cir. 2013)).

### C. DOJ Petitioners Lack Qualified Immunity.

No reasonable federal official, much less the Attorney General of the United States, Director of the FBI, and Commissioner of the INS, could have believed in 2001 that it was constitutional to impose arbitrary or race- and religion-based group punishment, even in the name of national security. To accept Petitioners' arguments to the contrary is to revive the rightly-discarded legacy of *Korematsu v. United States*, 323 U.S. 214 (1944).

### 1. Respondents' Rights Were Clearly Established.

The fundamental question for qualified immunity is whether "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). DOJ Petitioners unquestionably had fair warning here.

Equal protection principles have long forbidden the classification of prisoners based on race, religion and ethnicity. *See Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam); *Lee v. Washington*, 390 U.S. 333 (1968). All reasonable officials would know that "race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Kennedy, J. concurring); *see also Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The prohibition on depriving individuals of rights based on race, religion, or ethnicity has well-settled application in the specific contexts of prison and law enforcement. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (reaffirming the implicit holding of *Lee v. Washington*, that use of race in prison must be narrowly tailored to address compelling necessity); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (law enforcement need "does not justify stopping all Mexican-Americans to ask if they are aliens"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Constitution prohibits selective enforcement of the law based on considerations such as race.").

It is likewise established that prisoners have a due process right to be free from "arbitrary and purposeless conditions of confinement" not "reasonably related" to a legitimate governmental objective. *Wolfish*, 441 U.S. at 539.

Thus, a policy of randomly singling out pretrial detainees for placement in solitary confinement would be a clear violation of substantive due process. And a claim that Black prisoners were singled out for solitary confinement would clearly violate the rights to both substantive due process and equal protection. Respondents' allegations, taken as true, are indistinguishable from such paradigmatic constitutional violations.

Petitioners correctly note that the right in question should not be defined at "[too] high [a] level of generality," such as relying on the Fourth Amendment's general prohibition of "unreasonable" searches and seizures. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("specificity is especially important" in Fourth Amendment excessive force cases). But this Court has been equally clear that qualified immunity can be overcome without a case where "the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The question is simply one of fair warning, which is provided when the case law identifies a "general constitutional rule" that applies "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citation omitted). A right can be clearly established even if there are

"notable factual distinctions" between prior precedent and the case under review. *Id.* at 269-70.

Few legal rules apply with as obvious clarity as the prohibition on deprivations of rights motivated by race, religion, or ethnicity, and the mandate that detainees not be held in punitive conditions without justification. Indeed, DOJ Petitioners have no real quarrel with these fundamental principles, arguing instead that those rights did not clearly apply to their actions in the aftermath of 9/11. That argument is flawed and dangerous.

### 2. Respondents' Constitutional Rights Remained Clearly Established Under The Circumstances.

DOJ Petitioners argue that Respondents' rights to be free from discriminatory and punitive mistreatment were not clearly established in the "actual circumstances" Petitioners confronted. Ashcroft Br. 33. Respondents should not be viewed as "ordinary civil detainees" who might have had these constitutional rights, but as individuals who "had already been arrested pursuant to the September 11 investigation" and "subjected to the hold-until-cleared policy," which purportedly made their detention in restrictive conditions not "arbitrary and purposeless to national security." *Id.* This circular argument—Respondents were treated as if they posed a security threat, so it was reasonable to treat them as security threats—is foreclosed by the complaint.

The complaint plausibly alleges that Petitioners subjected civil detainees to restrictive confinement based on race, religion and ethnicity, *knowing* the FBI lacked an articulable basis to suspect them of any connection to terrorism. *See supra* Section I.B. Taking these factual allegations as true, Respondents *were* ordinary immigration detainees, suspected only of violating the immigration law. That Petitioners *treated* them differently cannot change the clearly established nature of their rights; the differential treatment is the gravamen of Respondents' claims.

Petitioners apparently assume that a policy of *knowingly* subjecting Muslim men of Arab or South Asian descent to harsh treatment, without individualized suspicion, could have been "justified" by an appeal to national security. Ashcroft Br. 33. But under the facts as alleged, it cannot. Petitioners point out that "other detainees *charged with* or *convicted of* terrorism-related offenses had incited acts of violence outside prisons and had carried out violent attacks inside prisons." *Id.* (emphasis added). For anyone falling in that category, however, there was already probable cause (or much more) to suspect a terrorism connection. For Respondents, there was not, and Petitioners are alleged to have known that fact. The suggestion that Respondents are in the same category as these "other detainees" is not a defense to claims of illegitimate racial profiling—it is an embrace of it.

Petitioners make the same mistake in urging that they were reasonably attempting to "limit[] the risk" that Respondents might be an "as-yet-unidentified

terrorist associate." Ashcroft Br. 34 (quoting App.143a). Taking as true the allegation that Petitioners knew there was no reason to suspect these men of terrorism, Respondents were no different than any ordinary immigration detainee—except they appeared to be Arab or Muslim.

While Petitioners attempt to keep their defense of race-based treatment implicit, they cite to the call of the dissenting judge to recognize an "inherent difficulty in identifying in advance of . . . investigation" who among a group of out-of-status non-citizens "within the same ethnic and religious group as the hijackers" "might have terrorist connections." App.140a-141a; *see* Ashcroft Br. 33. Any asserted difficulty in distinguishing peaceful Muslims of Arab descent who worked without a visa, from Muslims of Arab descent who violated the immigration law to carry out terrorist attacks, cannot justify treating the entire group as suspect. Such an argument "presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact." App.45a.

This logic is not without precedent:

> [The] exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was *impossible to bring*

> *about an immediate segregation of the disloyal from the loyal* that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.

*Korematsu*, 323 U.S. at 218-19 (emphasis added).

No one doubts that *Korematsu* arose in a time of genuine crisis when national security concerns were paramount. Yet this Court has long made clear that *Korematsu* was wrongly decided, and that the racial classification adopted as a response to World War II security concerns was nonetheless "illegitimate." *Adarand Constructors v. Pena*, 515 U.S. 200, 236 (1995). Long before 2001, it should have been clear to reasonable federal officers that racial and religious classifications are not a valid response to any perceived difficulty in separating the loyal from the disloyal.

Petitioners also contend that even if Respondents were "ordinary" detainees, it was not clearly unconstitutional to place them in restrictive conditions without individualized suspicion. Ashcroft Br. 35. Their support for this theory is that prisons have been permitted to uniformly deny contact visits to pretrial detainees, *Block v.*

*Rutherford*, 468 U.S. 576 (1984), or require searches of all detainees or arrestees, *Wolfish*, 441 U.S. at 558; *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1523 (2012). It does not follow that *any* level of restriction may be imposed without individualized need. Plainly no prison system could place all of its civil detainees in solitary confinement. And it certainly could not decide which detainees to subject to solitary confinement arbitrarily, or on the basis of race.

Finally, the existence of dissenting votes from the petition for rehearing en banc does not show that Respondents' rights were not clearly established. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 378 (2009) (differing views of judges, even groups of judges, does not entitle a party to qualified immunity). While judicial disagreement over whether a right exists may be relevant to the question of whether it is clearly established, *see al-Kidd*, 563 U.S. at 743, disagreement over whether to recognize qualified immunity cannot demonstrate that the right is not clearly established. In other words, reasonable jurists can disagree about whether an official's conduct was reasonable. If the rule were different, a court could only deny qualified immunity by unanimous vote.[17]

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[17] Similarly, the OIG Report, which is not a legal precedent, does nothing to contradict the clearly established nature of Respondents' rights. Indeed, although the OIG found the merger of the list "supportable," JA153, it more relevantly concluded that the restrictive conditions Respondents faced were not, JA302.

In making factual arguments at odds with the complaint, Petitioners illustrate that their request for qualified immunity is premature. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (inferences are drawn in favor of non-movant when assessing clearly established prong of qualified immunity). Once Petitioners are able to introduce *evidence* of why they did what they did, the lower courts will be able to determine whether they acted reasonably or in violation of clearly established rights. But until that evidence is brought forward, Respondents' factual allegations control, and they state clear and longstanding violations of the Constitution.

## II. Claims Against The MDC Petitioners Survive A Motion To Dismiss.

Respondents bring distinct claims against Petitioners Hasty and Sherman, who were directly responsible for the harsh conditions they faced in MDC's ADMAX SHU. These claims survive the pleading stage, and would do so even if the Court were persuaded that the claims against DOJ Petitioners should be dismissed.

### A. A *Bivens* Remedy Is Available Against MDC Petitioners.

MDC Petitioners make the same general *Bivens* arguments as DOJ Petitioners, and they fail for the same reasons. *Supra* Section I.A. Indeed, the arguments have little force in the context of abuse and discrimination by the warden and associate warden of a federal prison. In *Carlson*, this Court held that a *Bivens* remedy was available against the Director of the Federal Bureau of Prisons in a claim

regarding the failure to provide a *single* prisoner with constitutionally adequate medical care. 446 U.S. at 16 n. 1, 18-23. There is no reason to deny a remedy for MDC Petitioners' failure to securely and humanely detain the individuals in their care.

First, the complaint alleges that Hasty allowed and actively facilitated physical and verbal abuse of Respondents by MDC's correctional officers. *See infra* Section II.B. Every judge who has considered the issue has agreed that this claim of deliberate indifference to "unofficial abuse" arises in a familiar *Bivens* context. *See* App.24a-27a, 148a n.41 (Raggi, J., dissenting); App.241a (dissent from denial of rehearing en banc) (incorporating Judge Raggi's opinion). To hold otherwise would mean that a federal prison warden can encourage abuse of detainees without meaningful deterrence by the courts.

Respondents' Fourth Amendment claim similarly requires no extension of *Bivens*. *Bivens* itself involved a challenge to an unreasonable search and seizure by a federal official, 403 U.S. at 389-90, and this Court has subsequently considered many other Fourth Amendment fact patterns without questioning the availability of a *Bivens* remedy. *See, e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (challenge to pretextual detention as material witness); *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2004) (unlawful search claim); *Wilson v. Layne*, 526 U.S. 603, 606-608 (1999) (challenge to execution of arrest warrant).

As for Respondents' equal protection and substantive due process challenges to the "official"

conditions, *see infra* Section II.B.2, MDC Petitioners insist that the relevant "context" must be defined extremely narrowly: jailors who initially believed they would be holding detainees with suspected ties to terrorism, then eventually learned that the FBI lacked any individualized suspicion. Hasty Br. 25. Regardless of the factual problems with this theory, *infra* pp. 82-86, if this sort of detail required an extension of *Bivens*, so would every fact-intensive defense a prison official could raise. This Court has never suggested such an unpredictable approach. *See Farmer*, 511 U.S. at 830, 848-49 (applying *Carlson*, a case involving medical care, to a claim involving risk of harm to transgender prisoners).

MDC Petitioners had no role in setting "high-level policy . . . implicating both national security and immigration" (Ashcroft Br. 18), so they cannot bootstrap these alleged special factors to avoid *Bivens* liability. Nor is there any merit to their new argument that being a low-level implementer of a policy is its own "special factor." Hasty Br. 32. Hasty was the warden of the MDC, directly responsible for the humane treatment and security of all prisoners, and Sherman was his associate warden. As explained below, they created the challenged conditions of confinement, despite receiving detailed information about why Respondents were arrested and just how (un)interested in them the FBI was. Then they lied to conceal their failure to follow BOP policy. If they have a defense for good-faith reliance on valid superiors' orders, it would be available under the qualified immunity doctrine. *But see infra* pp. 86-89. There is no basis for a separate *Bivens* exception.

Finally, MDC Petitioners argue that Congress' "decision not to provide a remedy" is also a special factor counseling hesitation. Hasty Br. 33. But general congressional inaction cannot itself be a special factor; it is the starting point to any *Bivens* analysis. That may be why DOJ Petitioners advance no such argument. MDC Petitioners' only support for this argument is Judge Raggi's dissent, which identified the OIG reports as authorized by the USA PATRIOT Act. Hasty Br. 33 (citing App.115a-117a). But Petitioners do not explain how those reports "provide roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." *Minneci*, 565 U.S. at 130. Nor is there any basis to conclude that Congress considered and rejected a damages remedy; to the contrary, Congress was repeatedly informed of the ongoing *Bivens* litigation. JA45-46, 46 n.4, 187; *see* Lessons Learned–The Inspector General's Report on the 9/11 Detainees: Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2003), 2003 WL 21470415 (Fine, Glenn testifying) (noting that abuse, prolonged detention, communications restrictions are subject of ongoing litigation). Nothing Congress did manifested "the clearly discernible will" that claims against the warden and associate warden of the MDC should not proceed. *Davis*, 442 U.S. at 247.

In short, there is nothing to distinguish Respondents' claims—that MDC Petitioners subjected them to unduly restrictive conditions, searched them unlawfully, discriminated against them, and allowed their abuse—from thousands of similar claims brought against prison guards and

supervisors every year. These claims, which fall within *Bivens*' core purpose, should proceed.

### B. Respondents State Plausible Claims That MDC Petitioners Violated Their Clearly Established Rights.

The court of appeals correctly held that Respondents' substantive due process, equal protection, and Fourth Amendment claims against MDC Petitioners are plausible, and state clearly established constitutional violations. That decision should be affirmed.

#### 1. Hasty Is Liable For Subjecting Respondents To "Unofficial" Abuse.

The complaint alleges that MDC correctional officers engaged in a widespread pattern of physical and verbal abuse. *See* App.289a-292a, 300a, 303a, 307a, 319a (¶¶104-105, 109-110, 136, 147, 162, 200, 201); *see also* JA336-416 (Supplemental OIG Report). Hasty encouraged this abuse by referring to Respondents as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. App.259a-260a, 280a-281a, 291a-292a, 301a (¶¶24, 77, 109, 140). Though he tried to avoid being confronted with the results of these actions, he was made aware of the abuse nonetheless. App.259a, 280a-281a, 287a, 291a, 293a, 296a-297a, 300a (¶¶24, 77-78, 97, 107, 114, 123, 126, 137). As every judge who has considered the issue has agreed, these allegations state a plausible claim of deliberate indifference. App.201a. (district court decision);

App.54a-57a, 148a n. 41 (Raggi, J., dissenting); App.241a (dissent from en banc denial) (incorporating Judge Raggi's opinion).

Hasty disagrees. He misleadingly asserts that the OIG "concluded" that "none of the abuse 'was engaged in or condoned by anyone other than the correctional officers who committed it.'" Hasty Br. 54-55 (citing JA299 n.130). In fact, the passage he cites notes that the investigation had found no evidence of superior officer culpability "to date," but that the "investigation [wa]s ongoing." *Id.* What matters is not OIG's non-conclusion, but Respondents' well-pleaded complaint.

In response to Respondents' allegation that Hasty willfully blinded himself to abuses by neglecting to make rounds as required by BOP policy (App.260a (¶24)), Hasty presents the "obvious alternative explanation" that he had to delegate authority during that time. Hasty Br. 55-56. This unsworn statement is not "obvious" at all, but more importantly, it contradicts a specific allegation in the complaint and cannot be credited at this stage.

Hasty also insists that the allegation that he was "made aware" of the abuse is too general. Hasty Br. 55 (citing App.259a-260a (¶24)). Yet he disregards detailed allegations about *how* he was made aware. *See* App.260a (¶24) ("by inmate complaints, staff complaints, hunger strikes, and suicide attempts"); App.280a (¶77) (by logs, other official documents, videotapes and detainee complaints); App.291a (¶107) (by numerous complaints about abuse); App.292a (¶110) (by a complaint from Hammouda and other detainees about verbal abuse and assault);

App.300a (¶¶136-137) (by complaints about interference with religious practice).

According to Hasty, none of these allegations matters because there is no allegation that any subordinate informed him of any unaddressed guard misconduct. Hasty Br. 55. This is also contradicted by factual allegations. *See* App.281a (¶78) (staff memo to Hasty detailing detainees' complaints, resulting not in any action but in harassment against the whistleblower); App.291a (¶107) (Hasty's failure to investigate allegations of abuse).

Hasty blames his guards for making it difficult for detainees to file complaints, Hasty Br. 56, but the complaint and OIG Report establish that Hasty deserves at least some of the blame. *See* JA276-78 (MDC policy initially forbade detainees' retention of facility handbook in cell); App.279a-280a (¶¶75-76) (policy requested and approved by Hasty prohibited detainees from keeping any property in their cell). Finally, Hasty ignores altogether the allegation that he referred to the detainees as "terrorists," when they were not even "suspected terrorists." *See* App.57a (citing App.280a-281a, 291a-292a (¶¶77, 109)).

As every judge on the Second Circuit who has considered this claim recognized, these allegations suggest that Hasty not only ignored abuse, but actively encouraged it. App.56a, 148a n. 41, 241a. The claim survives.[18]

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[18] Hasty wisely does not claim qualified immunity for this clearly unconstitutional abuse.

### 2. Sherman And Hasty Are Liable For The "Official" Conditions Of Confinement.

Hasty and Sherman are both liable for the MDC conditions established as a matter of "official" policy. Hasty ordered his subordinates to develop uniquely harsh conditions, and he and Sherman approved those conditions. App.259a-261a, 276a-277a, 279a-281a, 287a-288a, 299a (¶¶24, 26, 27, 68, 75-76, 79, 98, 132). These conditions, described in detail in the complaint, included 23-24 hours-a-day lockdown in a cell in the ADMAX SHU, the most restrictive unit in the federal prison system; handcuffs, shackles, a waist chain, and the physical grip of at least three guards whenever Respondents were taken from their cells; redundant and humiliating strip searches; restrictions on all forms of communication; denial of recreation; inadequate provision of hygiene and religious items; constant illumination; sleep deprivation; exposure to temperature extremes; and failure to provide information about internal complaint policies. App.281a-301a (¶¶79-140). The court of appeals correctly held that imposition of these conditions on individuals with no legitimate connection to the terrorism investigation, but rather based on religion, race and ethnicity, plausibly state substantive due process and equal protection claims. App.50a-54a; *see also Iqbal*, 556 U.S. at 684 ("[W]e express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here.")

Hasty and Sherman respond that Respondents have not alleged conditions unrelated to legitimate penological interests or motivated by discriminatory animus. They argue that the complaint fails to "overcome the obvious alternative explanation—that Hasty and Sherman were complying with the FBI's terrorism designations and BOP policies." Hasty Br. 47. As an initial matter, mere speculation about possible lawful explanations cannot defeat detailed allegations that support a plausible claim. *Supra* Section I.B. But even on its own terms, there are several problems with Petitioners' factual argument.

First, the "FBI terrorism designations" Petitioners invoke do not exist on the face of the complaint or OIG reports. Rather, the complaint alleges that all Muslim, Arab, and South Asian non-citizens arrested for immigration violations as the result of a 9/11-related lead were treated as "of interest" to the terrorism investigation, *without* any determination by the FBI or anyone else that there was any reason to suspect them of a connection to terrorism. App.265a-268a (¶¶40-41, 43-47, 49). The OIG Report confirms that these detainees were treated as "of interest" even if they were merely encountered while following a different lead. JA66, 150-51.

What MDC Petitioners did receive from the FBI were regular written updates summarizing how each detainee came to be considered "of interest," and evidence relevant to the threat each might pose to the institution. App.277a (¶69). For example, they were told Khalifa was arrested because he was "encountered by INS" while following an FBI lead

and charged with an immigration violation, and that the "FBI *may* have an interest in him." App.277a-278a (¶70) (emphasis added); *see also* App.278a-279a (¶¶71-73). Any such "interest" proved minimal. *See e.g.*, App.319a-320a (¶202) (Khalifa interviewed once by FBI, in early October); *see also* App.304a (¶150) (Abbasi interviewed once by FBI, in mid-October); App.309a (¶168) (Mehmood never interviewed by FBI). Unsurprisingly, MDC Petitioners concluded that Respondents were not terrorists, but merely immigration detainees. App.279a (¶74). [19]

Because the official information from the FBI included no indication that restrictive conditions were appropriate, there was nothing to which to "defer." MDC Petitioners argue there was no reason to believe the FBI was sending all the information it knew about detainees to the MDC. Hasty Br. 49.[20] But a complaint is not required to provide

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[19] By "terrorism designations," MDC Petitioners may be referring to the information shared at DOJ Petitioners' instruction, that the "detainees were suspected terrorists" who needed to "be encouraged in any way possible to cooperate." App.274a-275a (¶61). But discovery has not yet disclosed how this information was shared with law enforcement, or what MDC Petitioners made of it, in light of the other information they received. It is inappropriate, pre-discovery, to resolve the relative responsibility of different groups of defendants, each alleged to have played a discrete role in discrimination and abuse, on the basis of unsworn finger-pointing.

[20] Petitioners baldly state that the updates contained evidence relevant "only" to the risk the detainees posed to the MDC (Hasty Br. 49), but this ignores the allegation, which clearly states that the updates also contained "summaries of the reason each detainee was arrested." App.277a (¶69).

explanations as to why particular defendants would believe particular things—the complaint alleges that MDC Petitioners knew that the FBI lacked evidence connecting the detainees to terrorism based on the information being provided to them. App.277a (¶69). Petitioners may testify in the future that they suspected they were denied some relevant information, but they certainly cannot establish this at the motion to dismiss stage.

Second, the complaint contradicts Petitioners' explanation that they were merely following "binding" BOP policy. *See, e.g.*, Hasty Br. 40. DOJ Petitioners ordered isolation and "maximum pressure," App.274a-275a (¶61), which was itself unconstitutional under the circumstances. *Supra* Section I.B.1.b. BOP Headquarters may have ordered placement in restrictive conditions in reliance on this illegal instruction, but Hasty and Sherman designed the specific conditions themselves, and in doing so went far beyond what BOP policy permitted.

For example, disciplinary segregation required a charge of a rule violation, 28 C.F.R. § 541.21 (2001), and administrative detention would be proper only for 30 days to investigate security risks. *Id.* § 541.22; JA241-42. Respondents' treatment fit neither policy. Yet MDC Petitioners combined disciplinary and administrative segregation to create new, highly restrictive conditions with none of the associated procedural protections. App.276a-277a (¶68); JA238.

Under MDC Petitioners' policy, Respondents were prohibited from keeping hygiene supplies in their cells (App.298a (¶130)); subjected to 24-hour

illumination and loud bar-taps on their cell doors through the night, depriving them of sleep (App.295a (¶¶119, 120)); denied clothing warm enough for them to "recreate" one hour a day, in a barren cage open to the elements (App.296a, 297a (¶¶122, 126)); denied warm clothes and blankets in their cells (App.297a (¶127)); denied copies of the Koran (App.299a (¶132)); denied telephone calls and visits (App.281a-283a (¶¶79, 83, 85)); and their attorney client visits, once they occurred, were video- and audio-taped (App.287a-288a (¶¶98, 99)). These innovations, too, contravened policy. *See* 28 C.F.R. § 541.22 (2001) (disciplinary segregation cells must be appropriately heated, segregated inmates must have opportunity to maintain appropriate level of hygiene, exercise must be permitted, religious reading material must be permitted); *id.* § 543.13(e) (auditory supervision of attorney client visits prohibited).

Such unusually restrictive conditions, imposed upon individuals whom the FBI *might* be interested in, and whom MDC Petitioners came to understand were mere immigration violators, are so arbitrary as to suggest punitive intent. As the court of appeals correctly held, this intent is corroborated by MDC Petitioners' creation of a memorandum falsely stating that the "suspected terrorists" were "classified" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." App.53a (*citing* App.279a (¶74)). In reality, no one considered any such information, and it squarely conflicts with the

information about Respondents that was actually provided. App.277a-278a (¶¶69-73)).[21]

This mendacity also provides a basis to infer that MDC Petitioners "approved the false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU based on discriminatory intent." App.69a; *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up discriminatory purpose"). Discriminatory intent is further buttressed by MDC staff's use of racially, ethnically, and religiously charged language to refer to Respondents. *See* App.71a-72a, 291a-292a, 300a, 303a, 324a (¶¶109-10, 136, 147, 218); JA268, 384. Use of these terms was brought to Petitioners' attention, and Hasty himself referred to Respondents as "terrorists." App.280a-281a, 291a-292a (¶¶77, 109); *see also* App.73a.

Given these factual allegations, MDC Petitioners' claim to qualified immunity also falls flat. The

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[21] MDC Petitioners object to the emphasis the court placed on the memorandum, arguing that it merely reports that *someone* classified the detainees as "high security," not necessarily the wardens. Hasty Br. 49-50. The memorandum has a comma that renders it difficult to read, but certainly may be read to claim falsely that terrorism determinations were made at MDC. Hasty Pet. App., No. 15-1363, at 467a ("The Executive staff at the MDC Brooklyn have determined the suspected terrorists, have been classified as High Security inmates . . . ."). On a motion to dismiss, Petitioners are not entitled to the reading of the memorandum that most helps their cause. Regardless, what is most significant is not *who* classified the detainees, but the patently false statement about *how* they were classified. *Id.*

question is not whether there was a pre-2001 case establishing that prison wardens must ignore "FBI terrorism designations." Hasty Br. 35. The question is whether a reasonable warden could have thought it lawful to hold immigration detainees for months in the extremely restrictive conditions they crafted, based on the fact that the FBI *might* be interested in them, even after learning there was no individualized basis for suspicion that they posed a danger. The answer is clearly no.

Prolonged placement in the ADMAX SHU, in ultra-restrictive conditions, violated BOP policy. *Supra* pp. 84-85. While a policy prohibiting conduct does not clearly establish its illegality, in combination with precedent, it can be relevant to the question of fair warning. *See Hope*, 536 U.S. at 743-44 (relying in part on regulations prohibiting challenged conduct to find fair warning); *cf. Layne*, 526 U.S. at 617 (policy allowing conduct in question relevant to lack of fair warning). Precedent, like BOP policy, clearly established that detainees may not be subjected to punitive conditions (like segregation) without a justification. *See Wolfish* 441 U.S at 535-39, 539 n.20.[22] And some of the conditions Petitioners imposed were clearly unconstitutional in any circumstance. *See Campbell*

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[22] Restrictive confinement may be lawful in some circumstances, but *Wolfish* does not support weighing justifications at the motion to dismiss stage—in *Wolfish*, the Court had before it an extensive record, including affidavits recounting undisputed facts, the district court's prison visits, over a month of trial testimony, deposition testimony, and post-trial memoranda and affidavits. *See United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 119 (S.D.N.Y. 1977).

*v. Meachum*, No. 96-2300, 1996 U.S. App. LEXIS 29456, at *11 (2d Cir. Nov. 4, 1996) (failure to provide an inmate with adequate toiletry articles states an Eighth Amendment violation); *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2d Cir. 2001) (exposure to cold states an Eighth Amendment violation); *Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996) (Eighth Amendment requires meaningful opportunity to exercise).

Even if MDC Petitioners could show that *all* the restrictive conditions—lack of hygiene supplies, exposure to cold, sleep deprivation, etc.—were based on orders from BOP headquarters, it is not reasonable for an officer to follow a clearly unlawful order. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) (rejecting officer's claims to qualified immunity based on his reliance on a magistrate's issuance of a warrant); *Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) (officer was not entitled to qualified immunity for his reliance on advice of his superiors that was not plausibly valid).

The claim that MDC Petitioners reasonably believed it lawful to treat these civil detainees so harshly is also belied by their creation of the false memorandum, described above, and by their failure to follow the BOP's reporting requirements for detainees held in administrative detention. BOP regulations required that such detainees receive weekly reviews and monthly hearings regarding the continued need for segregation. 28 C.F.R. § 541.22(c) (2001). MDC Petitioners ordered these requirements bypassed. App.276a-277a (¶68). "A course of conduct that tends to prove that the requirement

was merely a sham, or that [prison officials] could ignore it with impunity, provides . . . strong support for the conclusion that they were fully aware of the wrongful character of their conduct." *Hope*, 536 U.S. at 744.

Finally, even if prolonged ADMAX SHU placement were not clearly unlawful in light of the FBI's "interest," Petitioners fail to explain how it could possibly be lawful to continue to hold several Respondents in isolation for months *after* they were cleared by the FBI of any connection to terrorism. *See* App.315a-316a, 322a, 326a-327a (¶¶188, 211, 226, 227) (Benatta, Khalifa, and Hammouda held in ADMAX 168, 28, and 149 days, respectively, after clearance by headquarters).

For all of these reasons, Respondents' challenge to the "official" abuse crafted by MDC Petitioners survives a motion to dismiss.

### 3. Sherman And Hasty Are Liable Under The Fourth Amendment For Unreasonable Strip Searches.

The complaint also plausibly alleges unreasonable strip searches. MDC Petitioners argue that no facts were alleged showing they reviewed or approved the unwritten strip search policy. Hasty Br. 52. The Second Circuit correctly concluded otherwise. App.77a-78a. The complaint alleges that defendant Cuciti, one of Petitioners' subordinates, was tasked with "developing the strip-search policy on the ADMAX [SHU]," and that Hasty personally ordered him to design "extremely restrictive conditions of confinement." App.279a, 292a (¶¶75,

111). These allegations support the reasonable inference that Hasty ordered Cuciti to develop the strip-search policy, which was then approved and implemented by Hasty and Sherman. App.77a.

MDC Petitioners assert that the strip search policy was reasonably related to legitimate penological interests. Hasty Br. 53. But the complaint's specific factual allegations, taken as true, show it was not. App.292a-295a (¶¶111-17). Respondents allege "that they were strip searched when there was no opportunity to acquire contraband, including in instances where they were shackled and under escort, or were never permitted to leave their cells," creating a reasonable inference that no legitimate interest justified the strip searches. App.78a n.44.

MDC Petitioners also argue that Judge Raggi's dissent shows that the rights in question were not clearly established. Hasty Br. 43. Again, the fact of a dissenting opinion on the question of qualified immunity does not itself mean qualified immunity must apply—particularly when there is strong precedent supporting the right. *See Redding*, 557 U.S. at 378; *supra* p. 73. In 2001, it was clearly established in the Second Circuit that random and repeated strip searches are not reasonably related to legitimate government purposes. *See Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983).[23]

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[23] Judge Raggi's Fourth Amendment analysis was based on the premise that Respondents failed to plead immediately successive strip searches. App.160a. Respondents do allege such searches. App.292a-293a (¶112) (detainees searched upon arrival to MDC, escorted by four guards in handcuffs and

The Fourth Amendment claim against MDC Petitioners should proceed.

## III. Respondents State a Claim under 42 U.S.C. § 1985(3).

Respondents' final claim is that all Petitioners conspired to deprive them of the equal protection of the laws under 42 U.S.C. § 1985(3). Petitioners argue that they are entitled to qualified immunity on this claim because it was unclear in 2001 that section 1985(3) applied to federal officials.[24] Ashcroft Br. 38-39; Ziglar Br. 19-20; Hasty Br. 43-44.

Petitioners ask this Court to hold that even if they knew that it was wrong to engage in unconstitutional discrimination, they could not have known that it was wrong to conspire to do so. Such a defense does not serve the policies underlying qualified immunity. Qualified immunity is designed to give officials room to make "reasonable but mistaken judgments," *al-Kidd*, 563 U.S. at 743, but not to shield them when "the unlawfulness of the alleged conduct should have been apparent," *Hope*, 536 U.S. at 743. "[F]ederal officials could not have reasonably believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." App.83a (quoting *Hasty*, 490 F.3d at 177).

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shackles to the ADMAX SHU, and immediately searched again); JA392-93 (describing successive strip searches).

[24] It is unquestionably clear today. *See Hasty*, 490 F.3d at 176-77.

Petitioners respond by quoting two decisions of this Court, *Davis v. Scherer*, 468 U.S. 183 (1984), and *Elder v. Holloway*, 510 U.S. 510 (1994), out of context. *Davis* and *Elder* stand for the proposition that a defendant who does not violate a clearly established "federal right on which the claim for relief" is based is entitled to qualified immunity, even if his actions violate some other "clearly established duty." *Elder*, 510 U.S. at 515. Thus, that a defendant violated a state regulation was insufficient to sue on an alleged conspiracy to violate a due process right to a hearing, which was not clearly established. *Davis*, 468 U.S. at 195-96; *Elder*, 510 U.S. at 515. As long as the *federal right* is clearly established (here, the equal protection violation), there is no need for specific recognition of the mode of liability (conspiracy).

Finally, MDC Petitioners contend that employees of the Justice Department cannot conspire with one another, citing cases involving alleged conspiracies between private corporations and their corporate officers and directors. Hasty Br. 44. But this intra-corporate shield is at best limited to single corporate entities (together with wholly-owned subsidiaries) acting exclusively through their boards of directors and agents within their official capacities. App.82a. Official acts of the aforementioned individuals are attributed to the corporate entity, so a rule that none may be held to conspire with the others may make sense.[25] But such a rule would be wholly

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[25] *But cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 n.11 (1979) ("[W]e assume but certainly do not

inappropriate for *public* officials, sued in their *individual* capacities for actions alleged to be *outside of their authority*, working for a vast federal bureaucracy. The court of appeals found a number of these distinguishing inquiries to be so fact-intensive (and, perhaps, so weakly developed by Petitioners) that it would not be able to decide the issue as a matter of law, and appropriately remanded for further consideration by the district court. App.83a.

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decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3).").

## CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,


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December 2016

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AND I
BRIEFS

# NO. 15-1358

IN THE

## Supreme Court of the United States

JAMES W. ZIGLAR, PETITIONER,

v.

AHMER IQBAL ABBASI, *ET AL.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF OF PETITIONER JAMES W. ZIGLAR

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## I. PETITIONER JAMES W. ZIGLAR ADOPTS THE ARGUMENTS IN THE REPLY BRIEFS OF PETITIONERS IN NO. 15-1359 AND NO. 15-1363 WITH REGARD TO THE EXTENSION OF A *BIVENS* REMEDY TO THE CLAIMS AGAINST MR. ZIGLAR, AND WITH REGARD TO WHETHER MR. ZIGLAR IS ENTITLED TO QUALIFIED IMMUNITY.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Reply Brief For Petitioners Ashcroft and Mueller in No. 15-1359, and the arguments set forth in the Reply Brief For Petitioners Hasty and Sherman in No. 15-1363, the cases that the Court has consolidated with this case, both on the issue whether to extend a remedy under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Mr. Ziglar under the circumstances of this case, and on the issue whether the DOJ Defendants, including Mr. Ziglar, are entitled to qualified immunity.

On either of these grounds, the Court should reverse the judgment of the court of appeals as to Mr. Ziglar.

## II. THE ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT FAIL TO STATE A PLAUSIBLE CLAIM FOR RELIEF AGAINST MR. ZIGLAR UNDER *IQBAL*.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Reply Brief For Petitioners Ashcroft and Mueller in No. 15-1359, and the arguments set forth in the Reply Brief For Petitioners

Hasty and Sherman in No. 15-1363, regarding why the respondents' Fourth Amended Complaint fails to meet the pleading requirements of this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). He respectfully adds the following additional argument on this issue.

Respondents and several *amici* focus on the language in *Iqbal* where this Court stated that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. *See* Reprinted Brief For Respondents ("Brief For Resps."), at 47; *e.g.*, Brief Of Professors Of Civil Procedure As *Amici Curiae* In Support Of Respondents, at 6. Stated in terms particular to Mr. Ziglar, the issue under *Iqbal* is whether the Fourth Amended Complaint pleaded sufficient factual content to permit the court to draw a reasonable inference that ***Mr. Ziglar*** engaged in purposeful discrimination in violation of the Fifth Amendment's Equal Protection Clause, or violated respondents' substantive due process rights under the Fifth Amendment to be free from arbitrary and purposeless punishment.

At all stages of this lengthy litigation, respondents have tried to conflate their allegations against petitioners Ashcroft and Mueller with those against Mr. Ziglar, to allege claims against Mr. Ziglar by association, as it were. For example, after alleging that it was Mr. Ashcroft who ordered that the detainees on the FBI's New York List be held as persons "of interest" until cleared, the very next paragraph of their Fourth Amended Complaint alleged that this was "Ziglar's decision," based on his

"discriminatory notion[s]" about Muslims and Arabs. No. 15-1359, App. Petn. Cert., at 268a, ¶ 48.[1] In their merits brief in this Court, respondents similarly lump Mr. Ziglar in with Mr. Ashcroft and Mr. Mueller, referring to "Petitioners' decision to merge the lists," to the "dicriminatory inteny" of "DOJ Petitioners," and to "Petitioners' hold-until-cleared policy," without distinguishing among the three officials. Brief For Resps., at 64, 65 & 51.

In evaluating the plausibility of respondents' claims against Mr. Ziglar, however, the focus should be on the specific allegations as to him, to determine if those allegations are conclusory, and if not, whether they nevertheless fail to plead sufficient factual content to permit the court to draw the reasonable inference that Mr. Ziglar is liable for the equal protection and due process violations respondents seek to plead. The sparse allegations of respondents' Fourth Amended Complaint, conclusory or devoid of factual content, fail to pass this test as to Mr. Ziglar.

Before addressing those allegations, it bears emphasis that Mr. Ziglar during the times relevant to the Fourth Amended Complaint served as the Commissioner of the Immigration And Naturalization Service. He was

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[1] All subsequent references to the App. Petn. Cert. are to the Appendix filed in No. 15-1359 by petitioners Ashcroft and Mueller along with their certiorari petition.

not the Attorney General, with broad command of the federal government's law enforcement agencies. To the contrary, he was subordinate to the Attorney General. Mr. Ziglar had no authority over the Bureau of Prisons, and the Bureau of Prisons had no authority over Mr. Ziglar. Mr. Ziglar had no authority over the Director of the FBI or over agents of the FBI, and the Director of the FBI had no authority over Mr. Ziglar. *E.g.*, 2001 8 USCS § 1103, Power And Duties Of The Attorney General And Commissioner (reprinted in the Appendix to this brief).

Respondents' allegations against Mr. Ziglar must be read against this statutory statement of his duties and authority as INS Commissioner, both what he had responsibility for and what he did not. As INS Commissioner, Mr. Ziglar had no authority to order the FBI to detain those persons on the FBI's New York List. He had no authority to order that the persons on the FBI's New York List be designated as "of interest." He had no authority to determine the conditions under which the Bureau of Prisons held any persons (including those designated as "of interest" in the 9/11 investigation), at the New York Metropolitan Detention Center (or in any other Bureau of Prisons facility), in the aftermath of the 9/11 attacks (or at any other time). It is against this background of the scope of Mr. Ziglar's authority as INS Commissioner that the Fourth Amended Complaint's allegations as to him must be evaluated under *Iqbal*.

Respondents' brief on the merits in this Court catalogues their meager allegations about Mr. Ziglar. They note that the Fourth Amended Complaint alleged that Mr. Ziglar "condoned" or "complied with" Mr.

Ashcroft's decision to designate the persons on the FBI's New York List as "of interest," even though he knew that the FBI had no reason to suspect those persons of having ties to terrorism. Brief For Resps., at 51-52, 59-60 & 65. They refer to the averments of the Fourth Amended Complaint that supposedly contain "details" regarding "daily reports" Mr. Ziglar allegedly made to Mr. Ashcroft "on persons arrested and other developments of interest." *id.*, at 61, reports they characterize as "detailed." *Id.* at 4-5 & 61. And they allege that Mr. Ashcroft instructed Mr. Mueller to tell the Immigration And Naturalization Service to "round up every immigration violator fitting [the] profile" of "any male from a Middle Eastern country between the ages of 18 and 40 who came to the FBI's attention," *id.*, at 4, and that "Mueller complied." *Id.*, at 51.

Respondents then advert to allegations in the Fourth Amended Complaint that Mr. Ashcroft met with a "small group of government officials," App. Petn. Cert., at 274a, ¶ 61, and with that small group "mapped out" ways to pressure the detainees, including by spreading the word among law enforcement personnel that these detainees "were suspected terrorists, or people who knew who the terrorists were," and that the detainees should be encourgaged "in any way" to cooperate. *Id.*, at 274a-275a, ¶ 61. *See* Brief For Resps., at 56. Respondents allege that that Mr. Ziglar "was at many of these meetings," where he discussed "the entire process of interviewing and incarcerating out-of-status individuals." App. Petn. Cert., at 275a, ¶ 62.

These allegations, respondents argue, suffice to permit the Court to draw the inference that Mr. Ziglar knew respondents were being held in the most restrictive conditions, as well as the inference that he acted with discriminatory intent and with the intent to punish respondents arbitrarily. Brief For Resps., at 64-65.

There is less here than meets the eye. Despite their loose language, the Fourth Amended Complaint cannot be fairly read as alleging that Mr. Ziglar made the decision to hold the New York List detainees as "of interest" until cleared by the FBI. Rather, the Fourth Amended Complaint alleges only that Mr. Ziglar "condoned" or "complied with" Mr. Ashcroft's decision in that regard.

"Condone" means "to overlook, forgive, or disregard (an offense) without protest or censure." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, at 384 (4th ed. 2006). *E.g.*, III OXFORD ENGLISH DICTIONARY, at 384 (2nd ed. 1989) ("To approve or sanction, usu. tacitly; to tolerate.") The allegation that Mr. Ziglar "overlooked" or "forgave," or "disregarded without protest or censure," or "tolerated" Mr. Ashcroft's decision does not plausibly allege that Mr. Ziglar did anything wrong. It does not support an inference that Mr. Ziglar knew of the allegedly harsh conditions in which detainees were to be held in light of Mr. Ashcroft's decision, or that he acted with discriminatory or punitive motive.

As for the averment that Mr. Ziglar "complied" with the policy, that, in and of itself, is not sufficient to support a claim of purposeful constitutional violations by Mr. Ziglar. It must be supported by averments with "factual

content that allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. When one examines the specific allegations of the Fourth Amended Complaint as to how Mr. Ziglar supposedly "complied" with Mr. Ashcroft's decision, the flimsiness of respondents' claim against Mr. Ziglar become apparent.

The allegation that Mr. Ziglar prepared daily reports is of no consequence, as it alleges no improper conduct by Mr. Ziglar. The Fourth Amended Complaint in this regard alleged only that "Ashcroft insisted on regular detailed reporting ***on arrests***" and on "other developments of interest," with no further specification as to what those "other developments of interest" were. App. Petn. Cert., at 275a, ¶ 63. This allegation, and the allegation that Mr. Ziglar provided "much of this information," *id.*, at 275a, ¶ 64, in no way support the inferences that respondents seek to impute to them, most especially respondents' contention that these allegations show that Mr. Ziglar knew of the conditions in which respondents were allegedly being held. Brief For Resps., at 63. These are not sufficient allegations of fact to allow the Court to draw the inference that Mr. Ziglar knew anything other than the number of arrests.

The argument that Mr. Ashcroft told Mr. Mueller to instruct INS to round up young Muslims from Middle Eastern countries, and that Mr. Mueller complied, is not supported by the averments of the Fourth Amended Complaint. Respondents there alleged that Mr. Ashcroft so instructed Mr. Mueller, App. Petn. Cert. at 265a, ¶ 41, but it nowhere alleges that Mr. Mueller followed this

instruction, informed the INS about it, or brought Mr. Ashcroft's alleged instruction to Mr. Ziglar's attention. To the contrary, the Fourth Amended Complaint alleges that ***the FBI,*** not INS, carried out this instruction, and did so under the guidance of Mr. Ashcroft and Mr. Mueller, not Mr. Ziglar. Immediately after alleging that Mr. Ashcroft had instructed Mr. Mueller to "tell the INS to round up every immigration violator who fit" the profile, the Fourth Amended Complaint alleges:

> "***FBI field offices*** were thus encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that t his would result in the arrest of many individuals about whom they had no information to connect to terrorism. ***Mueller*** expressed reservations about this result, but he nevertheless knowingly ***joined Ashcroft*** in creating and implementing a policy that targeted innocent Muslims and Arabs." *Ibid.* (emphasis added).

This allegation cannot support any inference that Mr. Ziglar did anything at all as a consequence of Mr. Ashcroft's directive to Mr. Mueller, let alone anything wrong. *E.g., id.*, at 266a, ¶ 42 ("***The FBI field offices*** followed this guidance in investigating Plaintiffs and class members." (Emphasis added.)); Brief For Resps., at 63 ("Respondents alleged that Mueller ran the invesetigation out of FBI headquarters").

As to the allegations about the "small group" of government officials who met with Mr. Ashcroft to plan

how to pressure and coerce the detainees, the Fourth Amended Complaint fails to allege that Mr. Ziglar was a member of that "small group." *Id.*, at 274a-275a, ¶ 61. The Fourth Amended Complaint does allege that Mr. Ziglar "was at many of these meetings," but does not say which ones he attended, giving rise to the inference that there were meetings of this small group Mr. Ziglar did not attend. The Fourth Amended Complaint goes on to allege that all Mr. Ziglar discussed at the meetings he did attend was "the entire process of interviewing and incarcerating out-of-status individuals." *Id.*, at 275a, ¶ 62. This cannot be read as an allegation that Mr. Ziglar helped "ma[p] out ways to exert maximum pressure on the" detainees, discussed how to restrict the detainees' access to the outside world, or agreed to spread the word among the law enforcement community that the detainees had some connection with terrorism. Nor can it support drawing any inferences of discriminatory or punitive motive against Mr. Ziglar.

The Fourth Amended Complaint's flimsy factual averments about Mr. Ziglar cannot support an inference that he acted with either "punitive" or "discriminatory intent." *Id.*, at 64-65.[2] The allegations that he did so are

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[2] Respondents cite to a passage in Mr. Ziglar's Brief on the merits as conceding that Mr. Ziglar knew that the detainees shared the same national origin, race, and religion with the 9/11 attackers, adding "as if that is sufficient on its own to justify their harsh treatment." Brief For Resps., at 62-63. That passage in Mr. Ziglar's brief is a specific reference to what the Fourth Amended Complaint had alleged about

(continued...)

as conclusory as the averments to the same effect in *Iqbal*, and fail to plausibly allege that Mr. Ziglar acted in violation of the Constitution, just as the averments failed to support similar claims in *Iqbal*. Nor do the other averments of the Fourth Amended Complaint, even if characterized as non-conclusory, give respondents' claims the "facial plausibility" that *Iqbal* requires, because those averments fail to plead "factual content that allows the court to draw the reasonable inference that [Mr. Ziglar] is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Just as in *Iqbal*, the complaint at issue here has failed to allege that Mr. Ziglar acted " 'because of,' not merely 'in spite of the action's adverse effects upon an identifiable group." *Iqbal*, 556 U.S. at 681. The factual averments of the Fourth Amended Complaint as to Mr. Ziglar are consistent with an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (internal quotation marks omitted), namely, that Mr. Ziglar acted out of concern that the detainees could leave the country or engage in activities in furtherance of terrorist objectives if not detained until cleared.

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(...continued)

him, not a concession by Mr. Ziglar as to what he knew. Brief Of Petitioner James W. Ziglar, at 30 ("The FAC itself alleges Mr. Ziglar knew . . . ."). Even if it did not refer to the allegations of the Fourth Amended Complaint, the passage does not bear the import respondents place on it.

Respondents' Fourth Amended Complaint has failed to plead a plausible claim for relief as to petitioner James W. Ziglar. For that reasons, the Court should reverse the judgment of the court of appeals.

## CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Second Circuit as to petitioner, James W. Ziglar, in No. 15-1358.

Respectfully Submitted,

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# APPENDIX

*2001 8 USCS § 1103*

2001 United States Code Archive

***UNITED STATES CODE* SERVICE > *TITLE 8. ALIENS AND NATIONALITY* > *CHAPTER 12.* IMMIGRATION *AND NATIONALITY* > *GENERAL PROVISIONS***

## § 1103. Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

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**(a)**

**(1)** The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

**(2)** He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

**(3)** He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other

acts as he deems necessary for carrying out his authority under the provisions of this Act.

(4) He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service.

(5) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service.

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.

(7) He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this Act, detail employees of the Service for duty in foreign countries.

(8) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.

(9) The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized--

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service

pursuant to Federal law under an agreement with a State or political subdivision of a State; and

(B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.

After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws. Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

(b)

(1) The Attorney General may contract for or buy any interest in land, including temporary use rights,

adjacent to or in the vicinity of an international land border when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States against any violation of this Act.

(2) The Attorney General may contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be reasonable.

(3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings pursuant to the Act of August 1, 1888 (Chapter 728; *25 Stat. 357*) [*40 USCS §§ 257* and 258].

(4) The Attorney General may accept for the United States a gift of any interest in land identified pursuant to paragraph (1).

(c) The Commissioner shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. He shall be charged with any and all responsibilities and authority in the administration of the Service and of this Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General. The Commissioner may enter into cooperative agreements with State and local law enforcement

agencies for the purpose of assisting in the enforcement of the immigration laws.

(d)

(1) The Commissioner, in consultation with interested academicians, government agencies, and other parties, shall provide for a system for collection and dissemination, to Congress and the public, of information (not in individually identifiable form) useful in evaluating the social, economic, environmental, and demographic impact of immigration laws.

(2) Such information shall include information on the alien population in the United States, on the rates of naturalization and emigration of resident aliens, on aliens who have been admitted, paroled, or granted asylum, on nonimmigrants in the United States (by occupation, basis for admission, and duration of stay), on aliens who have not been admitted or have been removed from the United States, on the number of applications filed and granted for cancellation of removal, and on the number of aliens estimated to be present unlawfully in the United States in each fiscal year.

(3) Such system shall provide for the collection and dissemination of such information not less often than annually.

(e)

(1) The Commissioner shall submit to Congress annually a report which contains a summary of the information collected under subsection (d) and

an analysis of trends in immigration and naturalization.

(2) Each annual report shall include information on the number, and rate of denial administratively, of applications for naturalization, for each district office of the Service and by national origin group.

(f) The Attorney General shall allocate to each State not fewer than 10 full-time active duty agents of the Immigration and Naturalization Service to carry out the functions of the Service, in order to ensure the effective enforcement of this Act.

RECORD AND BRIEFS

Nos. 15-1358, 15-1359, 15-1363

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR, *Petitioner*,

*v.*

AHMER IQBAL ABASSI, ET AL., *Respondents*.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., *Petitioners*,

*v.*

AHMER IQBAL ABASSI, ET AL., *Respondents*.

DENNIS HASTY, ET AL., *Petitioners*,

*v.*

AHMER IQBAL ABASSI, ET AL., *Respondents*.

**On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit**

## AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions, including personal injury actions, employee rights cases, and consumer protection litigation.[1] An important element of AAJ's mission is to protect and preserve Americans' constitutional right to trial by jury and access to the courts.

AAJ is concerned that Petitioners in this case seek to impose a heightened standard of pleading ordinary claims governed by Federal Rule of Civil Procedure 8(a). AAJ believes that this requirement is not supported by this Court's precedents and would invade the province of the jury in violation of the Seventh Amendment.

## SUMMARY OF ARGUMENT

1. This Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), held that to survive a motion to dismiss for failure to state a claim a complaint must set forth factual content that allows the court to draw the reasonable inference that the defendant is liable for

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[1] All parties have consented to the filing of this *amicus curiae* brief, and copies of the emails granting consent have been filed with the Clerk. The undersigned counsel for *amicus curiae* affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

the misconduct alleged. The complaint in this case satisfies that requirement.

The standard applied by the lower court is easily discerned from its refusal to dismiss the claim that Defendants knowingly detained Plaintiffs under extremely harsh conditions, even though they were aware that the government had no individualized suspicion that any of the Plaintiffs had ties to terrorism. Plaintiffs' allegations regarding the conditions of their confinement were specific and based on firsthand experience. The court below inferred discriminatory intent on the part of Petitioners based in large part on Plaintiffs' allegations that each of the Defendants received detailed daily reports concerning the investigation of the individual detainees as well as the central roles Defendants played in the September 11 investigation.

Where the factual allegations could support two reasonable explanations Plaintiffs' complaint would survive the motion to dismiss. The court acknowledged that discovery may reveal that the inferences supporting Plaintiffs may be in error and that Defendants may ultimately be found not liable. However, on motion to dismiss, Plaintiffs were not required to prove their allegations, but only to plausibly plead them.

Petitioners argue to the contrary that where an explanation of the alleged facts consistent with their innocence is at least as likely, Plaintiffs' allegations founder and must be dismissed as implausible.

2. Petitioners' proposed pleading standard is not consistent with *Iqbal*. Indeed, this Court there emphasized that plausibility is not a probability

requirement. Nor does it require a plaintiff to demonstrate the merits of his or her case. Its purpose instead is to give the defendant fair notice of the nature of the claim and the grounds on which the claim rests.

It is well settled that a court passing on a Federal Rule of Civil Procedure 12(b)(6) takes all of plaintiff's factual allegations as true and draws all reasonable inferences in plaintiff's favor. Federal courts have overwhelmingly relied on this principle in applying the *Iqbal* plausibility standard. It follows that there can be more than one plausible explanation for a given set of facts and that the court is not obliged to determine which is more plausible or likely than another. This Court has indicated that a "more likely" standard would be too stringent a pleading requirement in ordinary cases, and the federal courts of appeals have broadly found reversible error in dismissals based on the district court's view that the inferences supporting defendants are more likely.

3. Petitioners' heightened pleading requirement necessarily involves the court in making factual assessments in violation of the fact finding role of the jury. The history of the Seventh Amendment underscores the fundamental importance of the right to trial by jury in civil cases. This Court has historically safeguarded that right. The fact that a procedural rule will be more efficient for the judicial system or less onerous for defendants cannot justify erosion of the parties' right to insist that the jury determine the facts of their case.

The Seventh Amendment preserves the right to a jury trial in suits tried to juries under the English common law in 1791. It also precludes procedural

rules that take such cases away from the jury, except as permitted by common law rules existing at that time. A rule that did not exist at that time will nonetheless be upheld so long as it preserves the substance of the common law jury trial.

The closest analog to the Rule 12(b)(6) motion to dismiss is the common-law demurrer to the pleadings, the only common law procedural rule that would allow a judge to determine pretrial that a case should be withheld from the jury. Under the demurrer to the pleadings, the movant was required to admit the truth of the factual allegations as well as all reasonable inferences therefrom and submit to the judge the purely legal question of whether a cause of action existed. The common law demurrer to the evidence similarly admitted all the facts in evidence, as well as every adverse inference that could be drawn therefrom, as true. The common law judge was not called upon to weigh the merits or the likelihood of the plaintiff's explanation of the facts. Thus, Petitioner's standard for dismissal was not a rule known to the common law.

Nor does that proposed standard preserve the substance of the common law jury trial. This Court has repeatedly stated that the heart of the right to trial by jury—and the aim of the Seventh Amendment—is to preserve the common law distinction whereby issues of law are decided by the court and issues of fact are decided by the jury. Petitioners' "more likely" standard plainly violates that vital characteristic of the jury trial.

## ARGUMENT

### I. The Court of Appeals Below Properly Applied the *Iqbal* Pleading Standard.

AAJ addresses this Court with respect to the third question presented. That question, variously framed by petitioners in these consolidated cases, asks whether Plaintiffs' allegations against Petitioners are sufficient to state a plausible claim to relief under the pleading requirements established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). All three Petitioners contend that the court below did not faithfully apply the *Iqbal* pleading requirements. Brief for the Petitioners John D. Ashcroft and Robert Mueller ("Ashcroft Br.") 40; Brief for Petitioners Dennis Hasty and James Sherman ("Ashcroft Br.") 46; Brief of Petitioner James W. Ziglar ("Ziglar Br.") 22.

AAJ contends to the contrary that the Second Circuit applied the *Iqbal* pleading standards properly. Further, in AAJ's view, the more stringent standard urged upon this Court by Petitioners is not consistent with *Iqbal*, is not consistent with the motion to dismiss standards universally applied by the federal circuit courts of appeals following *Iqbal*, and is not consistent with the constitutional right to trial by jury guaranteed by the Seventh Amendment.

#### A. The court below properly held that Plaintiffs' allegations allow the reasonable inference that Defendants are liable for the alleged misconduct.

In *Iqbal* this Court held that to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 556 U.S. at 678 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). A claim satisfies this plausibility standard if Plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. The complaint in this case well exceeds that standard.

AAJ does not undertake a close analysis of the facts and inferences detailed in the plaintiffs' complaint, as these are thoroughly discussed by the parties. AAJ, however, is intensely interested in the pleading standards applied by the Second Circuit and challenged in this Court by Petitioners. As this Court stated in *Iqbal*, these standards apply "to all civil actions," with limited exceptions, *id.* at 684 (citing *Twombly*, 550 U.S. 555-56 & n.3). Those include civil actions in which AAJ members seek to vindicate the rights of those who have been wrongfully injured or harmed.

The pleading standard applied by the lower court is easily discerned from the court's assessment of a central issue in Plaintiffs' claim that Defendants deprived them of their constitutional rights: That Petitioners subjected Plaintiffs to harsh conditions of confinement for no legitimate governmental purpose, but "simply because he happened to be—or, worse yet, appeared to be—Arab or Muslim." *Turkmen v. Hasty*, 789 F.3d 218, 245 (2d Cir. 2015).

The September 11 attacks were unique, not only in the scope of destruction, but also in the intense response of law enforcement and the fearful confusion of many Americans, who had little understanding of

their attackers. Sentiments that all Arabs or Muslims should be punished for the crimes of 19 Saudis were not uncommon.

Plaintiffs were arrested in the course of this investigation for various immigration law violations. They were detained at the administrative maximum special housing unit ("ADMAX SHU") while the FBI cleared each detainee of any connection with terrorists or terrorist activities. This Court has noted that these arrests and detentions could be justified as a precaution against unwittingly allowing a person guilty of the Sept. 11 attacks to escape the country. *Iqbal*, 556 U.S. at 682. Plaintiffs here are not challenging their arrests or initial detention. Instead, they allege that the harsh conditions of their confinement in the absence of any individualized suspicion of ties to terrorism violated their constitutional rights.

The conditions Plaintiffs endured at the ADMAX SHU were indeed harsh. Detainees were confined to small cells for 23 hours a day. First Am. Compl. ("FAC") ¶ 76 They were shackled and chained whenever they did leave their cells, *id.* at ¶ 76, and were physically and verbally assaulted. *Id.* at ¶¶ 105, 109 & 136. They were deprived of sleep, *id.* at ¶ 119, adequate food, *id.* at ¶ 128, and proper medical attention, *id.* at ¶ 108. They were strip searched whenever moved from their cells, and sometimes randomly in their cells. *Id.* at ¶¶ 112 & 113. Those strip searches were frequently accompanied by verbal insults, ridicule, videotaping and physical assault, all in violation of written policy. *Id.* at ¶ 116. Their "recreation" exposed them to the elements in freezing weather with inadequate clothing. *Id.* at ¶ 122.

These and other allegations of harsh treatment were specific and based on first-hand experience. The court below concluded that these conditions were not justified by the need to investigate possible terrorist connections, and "were not reasonably related to a legitimate goal, but rather were punitive and unconstitutional." 789 F.3d at 245 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

Still, as this Court made clear in *Iqbal*, the governmental officials in charge of Plaintiffs' confinement "may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 556 U.S. at 676. A plaintiff must plead that the officials themselves "acted with discriminatory purpose." *Id.*

As is often the case, plaintiffs cannot point to a document or recorded statement in which Petitioners directly expressed a discriminatory purpose for their actions. Nevertheless, this Court stated, "discrete wrongs—for instance, beatings—by lower level Government actors . . . if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part." *Id.* at 683.

The court below determined that Petitioners were entitled to that inference because they plausibly pleaded that the Defendants knew of the severe conditions imposed on the ADMAX SHU detainees and knew that the government had no individualized suspicion that any of the Plaintiffs had any connection to terrorism. This was sufficiently pleaded both with respect to the DOJ Defendants (Petitioners Ashcroft, Mueller, and Ziglar), 789 F.3d at 242, and with respect to MDC Defendants (Petitioners Hasty and Sherman). *Id.* at 248.

Plaintiffs' allegations in this regard are detailed and specific. Investigation of the attacks and the search for those responsible were the highest priority of federal law enforcement agencies in the months following September 11. Petitioners were closely involved in directing that endeavor. FBI Director Mueller ordered that the investigation be run out of FBI Headquarters, under his direct control. FAC ¶ 56. He "was in daily contact with the FBI field offices regarding the status of individual clearances." *Id.* ¶ 57. Ashcroft, Mueller and a small group of high government officials met regularly and "mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation," *Id.* ¶ 61. The punitive conditions in which Plaintiffs were held were the direct result of this strategy. *Id.* ¶ 65. Attorney General Ashcroft insisted on receiving regular, detailed reports, including a daily Attorney General's Report on persons arrested and other developments, which he used to brief the President and the National Security Council on the progress of the investigation. *Id* ¶ 63. Commissioner Ziglar attended the small group discussions regarding the confinement of 9/11 detainees. *Id.* ¶ 62. He received twice-daily briefings with his staff regarding the detentions, which provided information for his briefings to the Attorney General. *Id.* ¶ 64. On this basis, Plaintiffs alleged that "Ashcroft, Mueller and Ziglar knew that the FBI had not developed any reliable evidence tying Plaintiffs and class members to terrorism, yet authorized their prolonged detention in restrictive conditions nonetheless." *Id.* ¶ 67.

The court determined that Plaintiffs' allegations were well-pleaded and "render plausible the claim that" the DOJ Defendants knew of the MDC

Plaintiffs' confinement under severe conditions and knew "the government had no evidence linking the MDC Plaintiffs to terrorist activity." 789 F.3d at 246. The court recognized that this claim was not a fact to be assumed true, but rather it was a reasonable inference from those facts. Given the steady stream of information to the DOJ Defendants and their central roles in the investigation, "it seems to us plausible that information concerning conditions at the MDC . . . reached the DOJ Defendants." *Id.* at 240.

> Of course, we cannot say for certain that daily reports given to Ashcroft and Mueller detailed the conditions at the ADMAX SHU or that the daily meetings of the SIOC Working Group (containing representatives from each of the DOJ Defendants' offices) discussed those conditions. But on review of a motion to dismiss, Plaintiffs need not prove their allegations; they must plausibly plead them.

*Id.*

Similarly, the daily reports each DOJ defendant received regarding the status of the investigation and the detainees "support the reasonable inference" that the defendants learned "within weeks of 9/11" that detainees were being held "for whom the FBI had not developed any reliable tie to terrorism." *Id.* at 241. The court also noted Plaintiffs' allegation that some Justice Department officials had expressed misgivings about the conduct of the investigation, and stated that, in view of the daily briefings, "[t]he DOJ defendants were unlikely to have remained unaware of these concerns," *Id.* at

254. Further, conditions in the ADMAX SHU soon began to receive media attention, as the OIG Report pointed out. "[I]t seems implausible that the public's concerns did not reach the DOJ Defendants' desks. *Id.* at 240.

With respect to Warden Hasty and Associate Warden Sherman, the Complaint alleged that they ordered and approved the "extremely restrictive conditions of confinement" in the ADMAX SHU. FAC ¶¶ 24 & 75, even though both "were aware that the FBI had not developed any information" connecting Plaintiffs to terrorism. *Id.* at ¶ 69. Hasty and Sherman received regular written updates explaining why each detainee had been arrested and "evidence relevant to the danger he might pose" to the MDC, yet these updates often lacked any indication of a suspicion of a tie to terrorism. *Id.* at ¶ 69. The court below concluded that plaintiffs had plausibly pleaded a substantive due process violation based on detaining them in restrictive conditions knowing that there was no individualized suspicion tying any of them to terrorism. 789 F.3d at 248.

Plaintiffs also pleaded that Hasty could be liable for abuses committed by MCD guards, alleging that Hasty ignored evidence of abuses and disregarded reports by staff and detainees of physical and verbal abuse. FAC ¶¶ 77-78, 107, 110. The court concluded that these factual allegations "permit the inference that [Hasty] knew that MDC staff subjected the MDC Plaintiffs to the 'unofficial abuses' and permitted—if not facilitated—the continuation of these abuses." 789 F.3d at 250.

The lower court made clear that on motion to dismiss a plaintiff is not required to identify evidence

that would support a verdict in his favor. As the court noted, "Discovery may show that the Defendants—the DOJ Defendants, in particular—are not personally responsible for detaining Plaintiffs in these conditions. . . . The question at this stage of the litigation is whether the MDC Plaintiffs have plausibly pleaded that the Defendants exceeded the bounds of the Constitution in the wake of 9/11. We believe that they have." *Id.* at 264.

The court also pointed out that the pleaded facts could reasonably support two conflicting inferences and that both could be plausible. The court indicated that its role was not to weigh one against the other. "Because either is plausible, it is irrelevant that only inference (a) supports the conclusion" claimed by Plaintiffs. *Id.* at 243.

Petitioners assert several grounds for reversal. Of primary concern to AAJ is their contention that the court below was not entitled to draw the inferences described above because alternative explanations for the facts consistent with innocence were at least as likely.

### B. Defendants argue that the existence of more likely alternative inferences requires dismissal.

Petitioners do not seriously dispute plaintiffs' factual allegations concerning the conditions of their confinement. However, they offer alternative explanations for those facts. The DOJ Defendants contend that, as in *Iqbal*, "the challenged actions 'were likely lawful and justified by [a] nondiscriminatory'—and nonpunitive—intention 'to detain aliens who were illegally present in the United

States and who had potential connections to those who committed terrorist acts.'" Ashcroft Br. 42-43 (quoting *Iqbal*, 556 U.S. at 682).[2]

Petitioners Ashcroft and Mueller repeatedly assert that a court may not draw any inference from factual allegations that is not as likely as or more likely than competing alternative inferences offered by Defendants. For example, one issue involved the decision to merge the national INS list of of-interest arrestees with the New York FBI's list which contained many detainees with no basis for suspicion of terrorism. The DOJ Defendants contend that Plaintiffs' "theory of liability founders because the most likely explanation for the [lists-merger] decision is unconnected to any discriminatory purpose." Ashcroft Br. 17. They also reject Plaintiffs' allegation that the Attorney General made the decision to merge the lists, arguing that an alternative reading of the Inspector General's report suggests that the decision was made by Deputy Attorney General Levey. Ashcroft Br. 45. *See also id.* at 48 (The "inference of

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[2] In fact, the "challenged actions" quoted by Ashcroft were "the arrests Mueller oversaw." 556 U.S. at 682. The purported nondiscriminatory intent for holding Plaintiffs in the harsh conditions at ADMAX SHU is belied by the fact that such conditions were not deemed warranted for PENTBOM detainees at the Passaic County Jail or other non-federal facilities. FAC ¶ 66. In addition, immigration arrestees who were not Arab or Muslim (or Arab or Muslim in appearance) were not subjected to these conditions. *Id.* at ¶¶ 43 & 60c. By contrast, a Nepalese Buddhist, was held at ADMAX SHU because a government employee mistakenly reported seeing an "Arab male" taking photographs. *Id.* at ¶ 230. Moreover, many detainees remained confined in the ADMAX SHU even after having been cleared of any terrorist ties by the New York FBI field office and FBI Headquarters. *Id.* at ¶ 188.

discriminatory intent on Ashcroft's part is belied by the obvious alternative explanation for the lists-merger decision," *i.e.* concern that the FBI could unwittingly permit a dangerous individual to be released.). On another issue, also equating "likely" with "plausible," *see id.* at 46 ("Nor is it likely (as opposed to merely possible) that the regular arrest reports provided to petitioners indicated that some individuals were being detained without any evidence of a potential connection to terrorism.").

Petitioner Ziglar similarly contends that "where there exists an obvious alternative explanation for actions that the FAC alleges, . . . the respondents' claims of unconstitutional motive [are] implausible." Ziglar Br. 31. He argues, for example, that the allegation that the DOJ defendants "maintained restrictive confinement after learning that the FBI had not made individualized assessments" are implausible because a court cannot conclude "that defendants were not *more likely* concerned with national security than with discrimination on basis of race or religion." (emphasis added).

The MDC Defendants also suggest that, to be plausible, a claim must negate alternative inferences that would favor the defense. They contend, for example, that the FBI updates, from which the court inferred that Hasty and Sherman were aware of the lack of individualized suspicion, could also be interpreted as containing only information relevant to potential dangers to the MDC itself, consistent with their belief that the FBI would not send into a prison "*all* the potentially sensitive domestic and foreign intelligence information it was obtaining about detainees." Hasty Br. 49 (emphasis in original).

Hasty further suggests that "[n]ecessary delegation of authority and reliance on subordinates provides a far 'more likely' explanation" for his perceived indifference to evidence of abuses by guards at the ADMAX SHU. Hasty Br. 56. *See also id.* at 50 & 51 (faulting the lower court for not accepting an alternative "more likely" interpretation of allegedly false statement in memorandum). As with the claims against the DOJ Defendants, the court indicated that "[r]ecord proof may eventually establish that the MDC Plaintiffs' claim" is more limited. 789 F.3d at 249. However, at the motion to dismiss stage, "we conclude that the MDC Plaintiffs plausibly plead a substantive due process claim against Hasty and Sherman." *Id.*

## II. The Pleading Standards Proposed by Petitioners Are Not Supported by *Iqbal*.

### A. *Iqbal* does not require the court to weigh the likelihood of Plaintiff's allegations and inferences against competing inferences favoring Defendant.

Although *Iqbal* used the term "likely" in the context of the facts of that case, 556 U.S. 681, the Court made clear that the test it applied was whether "the factual allegations in respondent's complaint . . . *plausibly* suggest an entitlement to relief." The Court also made clear that this pleading standard is not a "more likely than not" standard. Obviously there can be more than one reasonable inference from a given set of facts. The Court in *Iqbal* emphasized that a court on motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is not called upon to determine whether one interpretation of the facts is more likely than the other. "The plausibility standard is not akin

to a 'probability requirement.'" 556 U.S. at 678, referring to this Court's fuller explanation of this point in *Twombly:*

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

550 U.S. at 556 (internal quotation marks omitted).

The purpose of this pleading requirement is not to require the plaintiff to demonstrate the merits of his or her case at this early stage, but to "satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests. *Id.* at 555 n.3 (internal quotes omitted).

This limited standard at the pleading stage is consistent with the "assumption [on motion to dismiss] that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002), and *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations")).

### B. The great weight of authority among the federal courts of appeals rejects the proposition that *Iqbal* requires the court to choose the most likely inference from factual pleadings.

It is a "proposition that is at the heart of the application of the Rule 12(b)(6) motion," that not only is the complaint to be construed in the light most favorable to the plaintiff and its factual allegations taken as true, but that "all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles Alan Wright & Arthur R. Miller, *et al.*, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004).

The courts of appeals have universally followed this proposition in applying the plausibility standard required by *Iqbal*. *See, e.g.*, *Najas Realty, LLC v. Seekonk Water Dist.*, 821 F.3d 134, 140 (1st Cir. 2016) ("We take all well-pleaded facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor."); *Lowinger v. Morgan Stanley & Co. LLC*, 841 F.3d 122, 126 (2d Cir. 2016) ("Upon review of a dismissal of a complaint under Fed. R. Civ. P. 12(b)(6), the facts, and inferences to be drawn from those facts, are viewed in the light most favorable to the plaintiff."); *Bolick v. Northeast Indus. Servs. Corp.*, No. 16-2463, 2016 WL 6804922, at *1 (3d Cir. Nov. 17, 2016) (same); *Harbourt v. PPE Casino Resorts Maryland, LLC*, 820 F.3d 655, 658 (4th Cir. 2016) ("we . . . construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff."); *Leal v. Corpus Christi-Nueces Cnty. Pub. Health Dist.*, 647 Fed. Appx. 514, 515 (5th Cir. 2016) (same); *Doe v.*

*Cummins*, No. 16-3334, 2016 WL 7093996, at *5 (6th Cir. Dec. 6, 2016) (". . . drawing all reasonable inferences in the plaintiff's favor"); *Berger v. Nat'l Collegiate Athletic Ass'n*, No. 16-1558, 2016 WL 7051905, at *2 (7th Cir. Dec. 5, 2016) (same); *K.B. v. Perez*, No. 16-1155, 2016 WL 7030320, at *2 (10th Cir. Dec. 2, 2016) (same); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 975 (11th Cir. 2016) (same).

This foundational proposition necessarily suggests that a reasonable inference is sufficient and need not be the most probable inference, or one that is more likely than an alternative inference that favors the defendant. This Court strongly indicated as much in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007). The Court there addressed the requirement in the Private Securities Litigation Reform Act of 1995 that a pleading "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4. Justice Scalia argued that "the test should be whether the inference of scienter (if any) is more plausible than the inference of innocence." 551 U.S. at 329 (Scalia, J., concurring). This Court rejected that pleading standard as too stringent. *Id* at 324 n.5. Certainly if more-likely-than an alternative inference is too high a pleading standard under a statute that demands enhanced pleading, it is surely too high a standard under Federal Rule of Civil Procedure 8.

Consequently, the federal courts of appeals have widely held that *Iqbal* does not require a plaintiff on motion to dismiss, to plead an interpretation of the facts that is more probable or likely than defendant's interpretation, and they have found reversible error

where district courts have weighed opposing inferences and chosen the likelier. For example, the First Circuit found it reversible error for the district court to dismiss plaintiff's cause of action where the court "improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants' conduct and adopted as true allegations made by defendants in weighing the plausibility of theories put forward by the parties." *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 50 (1st Cir. 2013); *see also Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013) (The court "may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42 (3d Cir. 2010) (*Iqbal* "does not require as a general matter that the plaintiff plead facts supporting an inference of defendant's liability more compelling than the opposing inference.").

The Fourth Circuit cautioned, "[w]hen a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. But it is not our task at the motion-to-dismiss stage to determine 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015) (quoting *Houck v. Substitute Trustee Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015)). *See also Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010) ("The court's task [on a Rule 12(b)(6) motion] is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of

success," (citing *Iqbal*, 556 U.S. 662)); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.").

As the Seventh Circuit in a widely-cited decision by Judge Diane P. Wood explained:

> 'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. . . . In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.

*Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (emphasis in original). *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party, and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject.") (internal quotation and citation omitted); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a

motion to dismiss under Rule 12(b)(6).") *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1386 (11th Cir. 2010) (Plaintiff "need not prove his case on the pleadings—his Amended Complaint must merely provide enough factual material to raise a reasonable inference, and thus a plausible claim."); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339-40 (Fed. Cir. 2012) (Finding reversible error in the district court's failure to draw all reasonable inferences in favor of the non-moving party. "*Twombly* did not alter this basic premise. Nothing in *Twombly* or its progeny allows a court to choose among competing inferences as long as there are sufficient facts alleged to render the non-movant's asserted inferences plausible.").

As the foregoing decisions indicate, Petitioners' proposal—that a plaintiff's claim is subject to dismissal where the court finds that defendant's explanation of or inferences from the facts are more likely than plaintiff's—violates both the principle that plaintiff's factual allegations must be taken as true and the principle that all reasonable inferences from the pleadings must be draw in favor of the pleader. In addition, AAJ submits, Petitioner's probability requirement at the pleading stage violates the Seventh Amendment right to trial by jury.

## III. THE PLEADING STANDARD PROPOSED BY PETITIONERS VIOLATES THE SEVENTH AMENDMENT.

### A. The constitutional right to trial by jury is of fundamental importance and this Court has historically guarded against any interference with that right.

Then-Justice Rehnquist emphasized that the "right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, C.J., dissenting). Its scope and effect "perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the amendment was adopted." *Id.* at 339. That historical setting is notable for "the passion and violence with which the civil jury was defended during the Revolutionary era and the constitutional ratification debate." Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 146-47 (1991).

The colonists had bitterly resented England's transfer of civil disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by the Crown's judges. *See* Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 69-72 (1957). Their list of grievances against the King, justifying their break with England, included "depriving us, in many cases, of the Benefits of Trial by Jury." *Declaration of Independence* ¶ 20 (1776). "The struggle over jury rights was, in reality, an important

aspect of the fight for American independence and served to help unite the colonies." Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 596 (1993). For that reason, many in the founding generation demanded a Bill of Rights that would preserve the civil jury from encroachment by federal judges. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting).

But on September 12, 1787, as the Constitutional Convention was ending its work in Philadelphia, James Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." The motion to add that right, however, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 293-94 (1966). To many, that omission suggested "virtual abolition of the civil jury," and it very nearly doomed ratification of the entire constitution. *Id.* 295-98; Charles W. Wolfram, The *Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 672 n.89 (1973). Only after the Federalists agreed to add a Bill of Rights containing such a jury guarantee did the Constitution win ratification. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830); Henderson, *supra*, at 295-98.

Historically, this Court has rigorously safeguarded this right. "During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to trial by jury in civil cases." Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 237 (1989). The threat to trial by jury in modern times, Justice Hugo Black

and Chief Justice William Rehnquist have both warned, is not its outright elimination but "the gradual process of judicial erosion" of the Seventh Amendment guarantee under the guise of interpreting procedural rules. *Parklane Hosiery Co.*, 439 U.S. at 339 (Rehnquist, J., dissenting) (quoting *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, J., dissenting)).

Although this Court in *Iqbal* indicated that the efficient operation of the federal judiciary and protection of defendants from burdensome discovery are important factors, AAJ urges the Court to heed the cautionary warning raised by then-Justice Rehnquist against expanding inroads on the jury right:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. The rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . . The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

*Parklane Hosiery Co.*, 439 U.S. at 348 (Rehnquist, J., dissenting). As this Court has repeatedly declared:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

*Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), *quoted in Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

AAJ submits that curtailment of the jury right through the use of unduly stringent pleading requirements to pretermit a jury determination of the facts of a case warrants such scrutiny.

### B. The requirement suggested by Petitioners would interfere with the jury's constitutional factfinding responsibility.

Petitioners' proposed pleading standard, under which the court must dismiss plaintiff's complaint if the factual pleadings and the inferences therefrom are not more likely than competing inferences that favor defendants, represents an intrusion into the factfinding role of the jury that the Constitution does not permit.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

This Court has long held that the "common law" in this context refers to the common law of England existing at the time the amendment was ratified. This Court has explained:

> Since Justice Story's day, *United States v. Wonson*, 28 F. Cas. 745, 750 (No. 16,750) (CC Mass. 1812), we have understood that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935). In keeping with our longstanding adherence to this "historical test," Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 640-643 (1973), we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was, *see, e.g.*, *Tull v. United States*, 481 U.S. 412, 417 (1987).

*Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996). The Seventh Amendment "has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791." *Dimick*, 293 U.S. at 487. *See also Thompson v. Utah*, 170 U.S. 343, 350 (1898) (stating that "common law" in the Seventh

Amendment refers to English common law in 1791); *cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (The right extends both to common-law causes of action and to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century.") (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)).

Thus, where a party has a constitutional right to a jury trial, a new procedure that affects the jury trial right (including taking the right away) is constitutional if the procedure preserves the substance of the English common law jury trial in 1791. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 379-80 (1913). For example, in *Dimick v. Schiedt*, the Court determined that additur, a procedure under which the court could augment a jury's award of damages based on a finding of inadequacy, violated the Seventh Amendment because "the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury." 293 U.S. at 482. Conversely, the court indicated that remittitur, based upon longstanding practice in American courts and "some support in the practice of the English courts prior to the adoption of the Constitution," would be upheld, at least where conditioned on grant of a new trial. *Id.* at 485. *Cf. Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 211 (1998) ("[R]equiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment.").

A procedure unknown to common law which permits a court to take a case from the jury may nonetheless be upheld under the Seventh Amendment if the procedure preserves the essential substance of the jury trial—the jury's responsibility to determine questions of fact. The Court explained in *Slocum*, 228 U.S. 364, that the aim of the Seventh Amendment is not to preserve "mere matters of form and procedure" but rather the "substance" of the right to a jury trial. *Id.* at 378. The Court identified "the right so preserved [as] the right to have the issues of fact presented by the pleadings tried by a jury. *Id.* at 399.

The closest analogous procedure to pretrial dismissal known to the common law is the demurrer to the pleadings. As the Advisory Committee's Notes to the Federal Rules of Civil Procedure state, "Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action." Fed. R. Civ. P. 12(b)(6), Advisory Committee's Notes to the Federal Rules of Civil Procedure, Notes to the 1948 amendments. Indeed, demurrer to the pleadings was the only pretrial procedure at common law "that would allow a judge to determine before trial that a case presented no issue to be decided by a jury, or that an issue in a case should be withheld from the jury." Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 Wash. U. L.Q. 687, 706 n.111 (2004) (quoting James Oldham, *The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered, in Human Rights and Legal History: Essays in Honour of Brian Simpson* 225, 231 (Katherine O'Donovan & Gerry R. Rubin eds., 2000)).

Under the common law demurrer to the pleadings the demurring party "admits the truth of those facts, and all reasonable inferences to be drawn therefrom." *United States v. Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544 (1892). The non-movant's "allegations must be taken as true; and all that can be reasonably inferred from those allegations . . . must also be held to be true." *Hammond v. Mason & Hamlin Organ Co.*, 92 U.S. 724, 726 (1875).

A similar common law procedure was the demurrer to evidence which was exercised during trial, commonly at the close of the plaintiff's evidence. *See, e.g., Gibson v. Hunter*, 126 Eng. Rep. 499 (H.L. 1793). As with the demurrer on the pleadings, the demurrant to the evidence at common law in England "had to admit all facts shown in evidence against him *and every adverse inference* that a jury could draw from that evidence." Henderson, *supra*, at 304-05 & n.48 (emphasis added). This Court, as well, has stated that a "demurrer to evidence admits not only the facts stated therein, *but also every conclusion which a jury might fairly or reasonably infer therefrom.*" *Parks v. Ross*, 52 U.S. 362, 373 (1850) (emphasis added). *See Fowle v. Alexandria*, 24 U.S. (11 Wheat.) 320, 323 (1826) (A demurrer to the evidence admits "whatever the jury may reasonably infer from the evidence.").

The crucial aspect of the demurrer for Seventh Amendment purposes is that, because the movant admitted the truth of every alleged fact and the inferences drawn therefrom, the common law court undertook no assessment of the facts or their weight or their comparative likelihood. The court simply accepted the facts pled by the plaintiff and the inferences from those facts that supported plaintiff's claim, however improbable the court might deem

them. As Professor Arthur Miller has noted, "The Federal Rules replaced the demurrer and the code motion to dismiss with the Rule 12(b)(6) motion." Yet those common law procedures "focused exclusively on the legal sufficiency of the plaintiff's statement of each substantive element of a cause of action, and did not involve a judicial assessment of the case's facts or actual merits." Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2010).

The standard proposed by Petitioners for passing on a motion to dismiss under Rule 12(b)(6), by contrast, does not limit the court to deciding questions of law upon admitted facts and inferences. Petitioners would have the court make an assessment of the inferences pled by the plaintiff compared to alternative inferences favoring defendants and adopt for its analysis those inferences that are more probable or likely. In short, the court would take the case away from the jury, not as a consequence of its decision of a question of law, but on the basis of its interpretation of the pleaded facts.

Such a procedure clearly violates the Seventh Amendment:

> The aim of the amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby . . . issues of law are to be resolved by the court and issues of fact

> are to be determined by the jury under appropriate instructions by the court.

*Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

As this Court has also emphasized, the issue "of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931). For this reason, protecting the "substance" of the right to a jury trial as it existed in 1791 "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative." *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 424 (1913).

Consequently, the pleading requirement proposed by Petitioners—that the court weigh plausible inferences from the facts and select the one which is most likely—would violate the substance of the right to jury trial protected by the Seventh Amendment.

## CONCLUSION

For the foregoing reasons, AAJ asks this Court to affirm the decision of the court of appeals.

December 23, 2016

Respectfully submitted,

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IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,
*Petitioner,*

v.

AHMER IQBAL ABBASI, ET AL.,
*Respondents.*

(CAPTION CONTINUED ON INSIDE COVER)

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 750,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I. In the intervening eight decades, the ACLU has frequently appeared before this Court during periods of national crisis when the government has abridged individual rights in the name of national security and immigration enforcement. The ACLU has extensive expertise on the issues raised by the *Bivens* question before this Court. The ACLU filed an amicus brief in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) itself, and has litigated numerous other *Bivens* cases before this Court and the lower courts.

The American Immigration Council ("the Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently

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[1] All parties have consented to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

appears in federal courts on issues relating to available remedies when immigration officers engage in unlawful and unconstitutional conduct, and undertakes research and advocacy related to the accountability of immigration enforcement agencies and personnel.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights. Over the last several years, through litigation and advocacy, NIPNLG has worked to promote government accountability for abuse and misconduct by immigration officials against noncitizens and individuals perceived to be noncitizens. To address these issues, NIPNLG represents select victims of immigration abuse and misconduct, appears as amicus curiae before federal courts, provides technical assistance, issues practice advisories, and conducts continuing legal education seminars. NIPNLG has a direct interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal immigration officers.

The National Police Accountability Project ("NPAP") was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers by coordinating and assisting civil rights lawyers. The project presently has more than 550 attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to

misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, that present issues of particular importance for the clients of its lawyers, *i.e.*, clients injured by law enforcement use of force.

The Northwest Immigrant Rights Project ("NWIRP") is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born. With over 35 attorneys and legal workers, NWIRP provides direct representation to low-income immigrants who are placed in removal proceedings and to those who face abuse and mistreatment by immigration officers. NWIRP has represented numerous victims of unconstitutional acts by border patrol agents and has a direct interest in the outcome of this case.

## SUMMARY OF ARGUMENT

*Amici* write to address the first of three issues presented in the petition for *certiorari*: whether *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides a cause of action for Respondents' claim that the punitive and abusive mistreatment inflicted upon them while they were detained in a federal correctional facility was unconstitutional.

The breadth of the Petitioners' position is startling. They claim that no *Bivens* remedy is available because this case involves high-level policy decisions and touches on issues of national security and immigration. That proposed rule would effectively immunize tens of thousands of federal officers, and large swaths of federal law enforcement activity, from damages, no matter how egregious the officers' conduct. Indeed, Petitioners' position would effectively immunize federal officers from damages liability even for torture, so long as the torture arises in a context involving national security or noncitizens.

This Court should reject that extreme position and affirm the critical importance of a *Bivens* remedy in deterring unconstitutional conduct and enforcing constitutional rights. As the Court explained in first recognizing the *Bivens* cause of action to remedy violations of constitutional rights, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 1 (Cranch 137), 163 (1803)).

Contrary to Petitioners' assertions, the Court need not break new ground to recognize a *Bivens* remedy in this case. Respondents' due process and equal protection challenges to the unconstitutional conditions of their confinement in a federal facility are clearly analogous to the claims that gave rise to *Bivens* actions in *Carlson v. Green*, 446 U.S. 14 (1980) and *Davis v. Passman*, 442 U.S. 228 (1979). For this reason alone, the Court should find a *Bivens* cause of action here.

Even if the Court determines that Respondents' claims present a new context, however, a *Bivens* cause of action should be recognized in this case. To be sure, the Court has declined to recognize the availability of a *Bivens* cause of action where the plaintiff can pursue an alternative remedial scheme established by Congress, or in the presence of "special factors" that counsel against the recognition of a cause of action. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). But neither of those exceptions to *Bivens* liability are present in this case.

Respondents have no recourse to any alternative remedial scheme. In contrast to other cases in which this Court has declined to find a *Bivens* cause of action, here Congress has neither provided an alternative remedy nor given any indication that the judiciary should deny *Bivens* relief. *Cf. Bush v. Lucas*, 462 U.S. 367, 388 (1983). To the contrary, the INA confirms that Congress intended to preserve a *Bivens* action in these circumstances. The statute setting forth the powers of immigration officers, 8 U.S.C. § 1357(g)(8), contemplates the availability of such a remedy. Congress similarly preserved a *Bivens* remedy when, in enacting the Westfall Act, it rejected executive branch proposals to eliminate *Bivens* liability and instead left intact constitutional tort remedies against federal officials, while displacing state law tort remedies. *See* 28 U.S.C. § 2679(b)(1). In any event, the Immigration and Nationality Act (INA) is not a substitute for *Bivens* because it provides no mechanism to deter constitutional violations or compensate victims. And this Court has previously held that the Federal Tort Claims Act

(FTCA) is not a substitute for *Bivens*. *Carlson*, 446 U.S. at 20-23. Thus, absent a *Bivens* action, Respondents have no adequate remedy.

Nor are there any "special factors" in this case that counsel against recognizing a *Bivens* cause of action. To the contrary, the context in which this claim arises strongly favors such a cause of action. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Petitioners cite immigration, national security, and high-level policymaking as "special factors," but offer no explanation for why any of these considerations would justify detaining noncitizens based on their ethnicity or religion, slamming detainees into walls, or otherwise subjecting them to abusive conditions of confinement. The deterrent effect of *Bivens* suits is all the more important for noncitizens, who, as history shows, have been frequent targets of discrimination, and against whom federal officers have committed egregious violations of individual rights in the name of "national security" or "public safety" concerns. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Federal courts have adequate tools at their disposal to curtail suits against officers who acted reasonably in specific circumstances. Most importantly, qualified immunity shields federal officials who do not violate

clearly established constitutional rights, even if they act unconstitutionally. *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009). The courts also have a variety of means to protect the government's interest in national security information that may be relevant to a *Bivens* action. These include the state-secrets privilege, *in camera* review of classified documents, and requiring counsel to obtain security clearances. These methods allow a court to carefully balance, in a particular case, the government's legitimate interests with the plaintiff's need for compensation and the societal interest in deterring constitutional violations.

Denying a *Bivens* remedy altogether, by contrast, is an unnecessarily overbroad, blunderbuss approach that allows for no such balance. The Court should reject a rule that would allow federal officers to commit egregious unconstitutional acts with impunity and would deny innocent victims any possibility for redress.

## ARGUMENT

"*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson*, 446 U.S. at 18. If a *Bivens* claim arises in a context for which this Court has previously granted a remedy, then a *Bivens* remedy is appropriate and no further inquiry is necessary. When deciding whether to apply *Bivens* to a new context, the Court applies a two-step test. *See, e.g., Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007). First, the Court determines whether an "alternative, existing process for protecting the [constitutionally recognized] interest amounts to a

convincing reason for the Judicial Branch to refrain from providing" a separate *Bivens* remedy. *Minneci v. Pollard*, 565 U.S. 118, 122-23 (2012) (quoting *Wilkie*, 551 U.S. at 550) (alteration in original). When no such alternative exists, the Court proceeds to the second step, in which it makes "the kind of remedial determination that is appropriate for a common-law tribunal," albeit one that pays "particular heed" to "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Wilkie*, 551 U.S. at 550).

Applying that test, a *Bivens* cause of action should be available to Respondents in this case. First, their claim challenging federal agents' unconstitutional mistreatment of prisoners presents a familiar context to which this Court and numerous lower courts have readily extended *Bivens*. Second, there is no alternative remedial scheme that would provide redress for the violation of Respondents' due process and equal protection rights. Third, there are sound reasons to recognize a *Bivens* cause of action in this case, and there are no "special factors" weighing against such recognition.

## I. Respondents' Unconstitutional Treatment of Prisoners in Federal Custody Does Not Extend *Bivens* into a New Context.

Respondents' due process and equal protection claims are rooted in a context long-recognized by this Court as giving rise to a *Bivens* cause of action: federal officers' gross mistreatment of individuals in their custody. In *Carlson*, this Court held that a prisoner had a *Bivens* cause of action against federal prison officials

who violated his Eighth Amendment rights by disregarding the medical advice of his doctors and his need for competent medical treatment. 446 U.S. at 16 n.1, 17-18. Over two decades later, the Court affirmed the availability of a *Bivens* cause of action for unconstitutional treatment claims against federal officers when it acknowledged that "a federal prisoner in a BOP facility [who] alleges a constitutional deprivation ... may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*, 534 U.S. at 72; *see also Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J., dissenting) (*Bivens* action "is available to federal pretrial detainees challenging the conditions of their confinement.").

The Courts of Appeals routinely have recognized that *Bivens* reaches allegations against federal officials for their mistreatment of individuals in federal custody. *See, e.g., Bistrian v. Levi*, 696 F.3d 352, 377 (3d Cir. 2012) (denying prison officials' motion to dismiss Fifth Amendment *Bivens* claims where prison officials exposed detainee to danger of inmate assault); *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (finding *Bivens* allegations sufficient where detainee alleged that prison officials "knew of his urgent medical needs but ignored them, and nevertheless ordered or acquiesced in his transfer to a facility where he received no medication..."); *Young v. Quinlan*, 960 F.2d 351, 360-64 (3d Cir. 1992) (reversing summary denial of Eighth Amendment claims of inadequate protection and conditions of confinement); *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (finding error in dismissal of

Fifth Amendment *Bivens* claims against prison officials over allegedly discriminatory adverse actions); *Cale v. Johnson*, 861 F.2d 943, 948 (6th Cir. 1988) (recognizing *Bivens* claims where disciplinary action taken in retaliation for inmate complaints about food); *Cleavinger v. Saxner*, 474 U.S. 193, 206-07 (1985) (affirming denial of Fifth Amendment *Bivens* claims against members of disciplinary committee on qualified immunity grounds).

Similarly, the availability of a *Bivens* cause of action for equal protection claims is well-settled. *See Davis*, 442 U.S. at 230 & n.3 (recognizing *Bivens* action for equal protection claim stemming from U.S. Congressman's termination of employee based on her sex); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (expressing no doubt as to the viability of a well-pleaded equal protection claim for the mistreatment of detainees directed by high-level officials in post-9/11 investigation).

It makes no difference that Respondents here are noncitizens. They enjoy the same constitutional protection against mistreatment and discrimination while in federal custody as citizens, and there is no principled reason to deny them the same constitutional remedy to which citizens are entitled. Courts of appeals have accordingly recognized noncitizens' ability to sue under *Bivens* to deter violations of their constitutional rights and to receive compensation when those rights are violated. *See, e.g., Martinez-Aguero v. Gonzales*, 459 F.3d 618, 625 (5th Cir. 2006) (holding *Bivens* available where INS officer beat and yelled profanities at a defenseless noncitizen without provocation); *Papa v. United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002)

(reversing district court dismissal of *Bivens* claim where federal officers "knowingly plac[ed] [immigration detainee] in harm's way"); *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1039, 1042-43 (1st Cir. 1989) (allowing case to proceed to discovery against immigration officer on *Bivens* claim where noncitizen was held incommunicado for over ten days); *cf. Humphries v. Various Fed. USINS Emp.*, 164 F.3d 939, 944 (5th Cir. 1999) (reversing dismissal of damages suit against INS and FBI officials involving claims under the Thirteenth and Fifth Amendments); *Matter of Sandoval*, 17 I. & N. Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available.").

## II. There Is No Alternative Remedial Scheme to Redress Respondents' Claims of Unconstitutional Treatment While in Federal Custody.

Even if the Court determines that Respondents' claims present a new context, the Court should recognize that a *Bivens* cause of action is available in this case. Respondents' claims unquestionably satisfy the first step of the inquiry: there is no alternative remedial scheme through which Respondents can seek redress for the violation of their constitutional rights under federal or state law. "For [Respondents], as for Bivens, it is damages or nothing." *Malesko*, 534 U.S. at 72 (quoting *Davis v. Passman*, 442 U.S. at 245).

### A. There Is No Alternative Remedy Under Federal Law.

First, there is no alternative method under federal law through which Respondents can receive any compensation for the violation of their rights. That sets this case apart from those cases in which this Court has declined to recognize a *Bivens* remedy because of the availability of an alternative remedial scheme.

No such alternative federal remedial scheme exists in this case, and Petitioners do not meaningfully contend otherwise. Certainly, the INA does not offer any adequate remedy. Indeed, in the INA itself, Congress contemplated the continued availability of a *Bivens* remedy. In the INA, Congress established a framework for allowing state officers to act as immigration officers, 8 U.S.C. § 1357(g), and sought to give those state officers the same protections from suit that it understood federal immigration officers to enjoy. It provided that such a state officer "shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law." 8 U.S.C. § 1357(g)(8). The reference to a suit against an "*officer or employee* in a civil action brought under *Federal* . . . law," *id.* (emphasis added), is necessarily a reference to *Bivens*. A suit under the FTCA is a suit against the United States, not against an "officer or employee," and does not implicate individual liabilities or immunities. *Id.*

Additionally, in enacting § 1357, Congress was legislating against the backdrop of *Carlson*, 446 U.S. at 19-24, which held that the availability of a remedy under

the FTCA does not preclude a *Bivens* action for the same injury. Thus, rather than displacing a *Bivens* cause of action, Congress manifestly intended the INA to co-exist with *Bivens*. There is no basis for this Court to read the INA to implicitly do what Congress expressly declined to do.

What is more, the INA is not remedial and thus is unlike the statutes that the Court has found provide an adequate alternative to *Bivens*. For example, in *Bush*, the Court found that the "elaborate, comprehensive scheme" of civil-service protections and procedures precluded recognition of a *Bivens* cause of action to redress retaliatory firings in violation of the First Amendment. 462 U.S. at 385. That system, the Court found, "provide[d] meaningful remedies for employees" who claimed to have suffered retaliatory action in violation of the First Amendment. *Id.* at 386.

Likewise, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a *Bivens* action against government officers who allegedly violated due process in denying claims for Social Security disability benefits. The Court pointed to "elaborate" administrative structure and procedures, *id.* at 414, that Congress specifically designed to address problems created by the wrongful termination of disability benefits. In devising that system, Congress "chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations...." *Id.* at 426. Given Congress's careful calibration of this remedial scheme, the Court deferred to Congress's judgment as to how best to "mak[e] the inevitable compromises required in the design of a

massive and complex welfare benefits program." *Id.* at 429.

The Court reached a similar conclusion in a case involving military discipline. There, too, "Congress ... ha[d] established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provide[d] for the review and remedy of complaints and grievances such as those presented by" the plaintiffs. *Chappell*, 462 U.S. at 302.

In contrast to these statutes, the INA is a scheme governing only the admission, exclusion, and removal of noncitizens. Respondents' claims have nothing to do with any of these actions. Nothing in the INA even alludes to conditions of confinement in immigration detention. Nor does the INA provide for the redress of injuries suffered as a result of constitutional violations; the INA simply is not a remedial scheme at all. Immigration courts are powerless to hold federal officers accountable for the suffering, outrage, emotional distress, and humiliation that Respondents allege. *Amici* know of no instance where immigration evidence has been suppressed or proceedings terminated based on allegations concerning conditions of confinement.

Where no alternative remedy is available for the plaintiffs, the Court has denied *Bivens* relief only in the military context, in a decision that expressly relied on the unique disciplinary structure of the military. *See United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (suits by military service members against military officials for injuries arising out of or in the course of activity incident to military service). This Court's twin

military *Bivens* rulings rested specifically on the "special status of the military," *Chappell*, 462 U.S. at 303-04, with its independent system of justice for military personnel and "unique disciplinary structure." *Stanley*, 483 U.S. at 681-84; *Chappell*, 462 U.S. at 303-04. Those concerns are inapplicable to this lawsuit, brought by civilians against civilian immigration officers.

### B. There Is No Alternative Remedy Under State Law.

There is no alternative remedy available to Respondents under state law, in contrast to cases such as *Minneci* and *Malesko*. *See Minneci*, 565 U.S. at 129-30 (declining to find a *Bivens* cause of action where state tort remedy was clearly available); *Malesko*, 534 U.S. at 73-74 (same). In *Minneci*, for example, the Court held that a prisoner could not bring a *Bivens* action against employees at a privately run prison, because suit could be brought under state tort law. The availability of that state-law remedy distinguished *Minneci* from a claim against a federal prison official, for which *Bivens* is available. As the Court explained, *Bivens* is needed in latter situation because "[p]risoners ordinarily cannot bring state-law tort actions against employees of the Federal Government." *Minneci*, 565 U.S. at 126. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), the United States would be substituted as the defendant in any state-law suit against Petitioners, and Respondents would be forced to proceed under the FTCA. 28 U.S.C. §§ 1346(b), 2671 *et seq.* And as noted above, the FTCA is not the kind of alternative remedial scheme that can displace a *Bivens* cause of action. *See Carlson*, 446 U.S. at 20-23. The Court held in *Carlson* that "[p]lainly

FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [a plaintiff] exclusively to the FTCA remedy." *Id.* at 23. As testament to this intent, in enacting the FTCA, Congress twice rejected proposals to eliminate *Bivens*. *See* James F. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132-35 & n.100 (2009).

## III. No "Special Factors" Counsel Against Recognition of a *Bivens* Cause of Action.

Petitioners' main argument against recognizing a *Bivens* cause of action in this case is that, even if there is no alternative remedial scheme, "special factors" nevertheless counsel against applying *Bivens* here. Ashcroft Br. 23-30; Hasty Br. 29-33. But none of the special factors identified by the Court are present in this case. At bottom, this case involves the abusive mistreatment of detainees in federal custody, including beating detainees and slamming them into walls, and singling them out on the basis of their ethnicity and religion, without any individualized basis whatsoever. There is no policy justification for such unconstitutional abuse, nor have Petitioners advanced any reasoned basis for the infliction of such abuse.

Nevertheless, Petitioners maintain that the national security and immigration aspects of this case, coupled with the involvement of high-level policymaking officials, are "special factors" warranting hesitation in recognizing a *Bivens* remedy here. But vague invocations of policymaking and national security should not defeat judicial review of constitutional violations nor

the right to a remedy. This Court has rejected a version of that same argument before, when it refused to grant absolute immunity to the Attorney General, who was alleged to have ordered an unconstitutional wiretap. *See Mitchell v. Forsyth*, 472 U.S. 511, 521-24 (1985). Courts, moreover, have ample tools at their disposal to address any legitimate and specific national security concerns. The possibility that a case might implicate national security interests is not a reason to foreclose a *Bivens* remedy altogether.

Likewise, the fact that this case involves noncitizens who were in immigration detention is not a "special factor" warranting hesitation. Hundreds of thousands of individuals pass through immigration detention each year. The number may rise if immigration enforcement efforts are increased. It is vitally important that this Court reject Petitioners' contention that this massive detention system can become a zone of immunity in which noncitizens can be subjected to abuse and mistreatment without any remedy. As numerous reported cases demonstrate, the need for deterrence is acute.

### A. The "Special Factors" Previously Recognized By This Court Do Not Exist In This Case.

The "special factors" that have led the Court in previous cases to decline to recognize a *Bivens* remedy are not present in this case.

First, the Court has found that "special factors" counsel against a *Bivens* remedy when there is not a judicially manageable standard to adjudicate the alleged

constitutional wrong. Thus, in *Wilkie*, the Court declined to recognize a *Bivens* cause of action to seek redress for the government's alleged retaliation against the plaintiff on account of his exercise of his property rights. 551 U.S. at 562. The Court reasoned that "[a] judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out," and that there would be "serious difficulty [in] devising a workable cause of action." *Id.*

That concern does not apply here. The standards for adjudicating conditions-of-confinement claims in federally owned and operated facilities are well established, and the Court has found no difficulty devising a workable cause of action for conditions-of-confinement suits. *See Carlson*, 446 U.S. at 18-20.

Second, while the Court has found "special factors" to exist in the context of military discipline, the Court reasoned that the "military establishment" has a "unique disciplinary structure," *Chappell*, 462 U.S. at 304, and the integrity of that disciplinary structure is necessary for the military to perform its function. The "special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 304. Accordingly, allowing *Bivens* suits in that context would be "inappropriate." *Id.*; *see also Stanley*, 483 U.S. at 683-84.

The special factors that informed the Court's holding in *Chappell* and *Stanley* are not present in this case,

contrary to Petitioners' assertion, *see* Hasty Br. at 32-33. The Court in *Chappell* and *Stanley* was focused on the corrosive effect that allowing soldiers to sue their commanding officers could have on military discipline. *Chappell*, 462 U.S. at 300, 303-04; *Stanley*, 483 U.S. at 681-84. That concern does not exist in this case. The military context is, as this Court put it, "unique." *Chappell*, 462 U.S. at 300. Indeed, as noted above, the Court has long recognized the availability of a *Bivens* suit by federal prisoners, despite the need for tight discipline and control of prisons. *See Carlson*, 446 U.S. at 18-20.

### B. Federal Officers' Invocation of "National Security" Concerns Is Not a Special Factor Counseling Against a *Bivens* Remedy.

Petitioners assert that high-level policymaking decisions concerning "national security" constitute a special factor weighing against recognition of a *Bivens* action here. The Court should reject that argument, just as it rejected a similar argument made more than thirty years ago in *Mitchell*. In that case, the Court rejected the argument that national security justifies the absolute immunity of government officers against *Bivens* suits. The Court reasoned:

> Built-in restraints on the Attorney General's activities in the name of national security ... do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary.... The danger that high federal officials will disregard constitutional

> rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.

472 U.S. at 523; *see also id.* at 523 n.7 (acknowledging necessity of *Bivens* in cases implicating national security because "declaratory or injunctive relief and the use of the exclusionary rule ... are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation."). The same logic compels rejecting Petitioners' argument here, which, by denying any cause of action to sue, would confer an effective absolute immunity on federal officials.

Because "national security" is a concept with ill-defined boundaries, it is particularly dangerous to allow government officials to enjoy effective immunity from suit whenever the concept can be invoked. As the Court reasoned in *Mitchell*, "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* at 523 (quotation marks omitted); *see also* Laura K. Donohue, *The Limits of National Security*, 48 Am. Crim. L. Rev. 1573, 1579-84 (2011) ("'[N]ational security' is rarely defined," and "the term is frustratingly broad, [and can give] rise to important constitutional concerns."). As this Court has put it, "[T]he label of 'national security' may cover a multitude of sins." *Mitchell*, 472 U.S. at 523.

Focusing on the specific national security interests cited by Petitioners makes clear that these interests can be addressed through means more tailored than the wholesale denial of a cause of action. There is no "national security" justification for slamming detainees

into walls, or otherwise subjecting them to the kind of abusive conditions alleged here.

Petitioners Hasty and Sherman argue that local jailers should not be held liable when they blindly accept FBI terrorism designations, Hasty Br. 25, 30, but these designations do not authorize such unconstitutional abuse. Federal officials cannot avoid liability for violations of well-established constitutional rights by asserting that they are just following the orders of policymakers. *See Wesby v. District of Columbia*, 765 F.3d 13, 29 (D.C. Cir. 2014) ("This Court has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was 'just following orders.'"), *pet'n for cert. filed*, 84 U.S.L.W. 3686 (U.S. June 8, 2016) (No. 15-1485); *Kennedy v. City Of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) ("[S]ince World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence."). An officer has the "responsibility to decide for himself whether to violate clearly established constitutional rights." *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 (11th Cir. 2004).

Petitioners Ashcroft and Mueller argue that whether Respondents could justifiably be subjected to the abusive conditions of confinement they suffered depends upon a "broad range of national-security considerations" that may force a court to "second-guess high-level executive policies." Ashcroft Br. 27-28. But again, Petitioners offer no conceivable argument that national security would justify the kinds of mistreatment inflicted upon Respondents. Moreover, to the extent

that they maintain that the circumstances rendered their treatment of Respondents either constitutional or not a violation of clearly established rights, those arguments can be considered in the qualified immunity and merits determinations, and do not provide a threshold reason to dismiss all inquiry. *Pearson*, 555 U.S. at 231-32 ("[W]e have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery.") (quotation marks omitted) (second bracket added); *see also Mitchell*, 472 U.S. at 524 (observing that for national security matters, qualified immunity standard protects government officials from being subject to "frivolous and vexatious complaints" while also incentivizing those same officials to "pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States.").

Petitioners also contend that these cases may involve classified or sensitive information. Hasty Br. 30. But the courts have numerous tools for handling litigation involving classified or sensitive matters without unduly interfering with the Executive's intelligence-gathering activities. Indeed, federal courts routinely consider matters that implicate "national security," including by adjudicating the factual and legal bases for detention of citizens designated as enemy combatants, *Hamdi*, 542 U.S. at 509, adjudicating habeas petitions brought by alleged enemy combatants, *Boumediene v. Bush*, 553 U.S. 723, 732 (2008), and adjudicating constitutional claims, *Webster v. Doe*, 486 U.S. 592 (1988).

One such tool is the state-secrets privilege, under which the government may refuse to disclose information sought in discovery if the disclosure might reasonably jeopardize national security. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Courts can also "evaluate classified and sensitive evidence while maintaining secrecy" by receiving that evidence under seal, and courts can "issue opinions without disclosing that evidence." *Meshal v. Higgenbotham*, 804 F.3d 417, 446 (D.C. Cir. 2015) (Pillard, J., dissenting), *pet'n for cert. filed*, 84 U.S.L.W. 3675 (U.S. May 31, 2016) (No. 15-1461). Court personnel and counsel can be required to obtain security clearances, and "[c]ourts can assign codes or aliases in a case to enable witnesses to testify about secret matters in a way which the judge, jury, and attorneys will understand, but the public will not." *Id.*; *see also* Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges* (June 25, 2013). In sum, "the District Court has the latitude to control any discovery process which may be instituted so as to balance [a plaintiff's] need for access to proof which would support a colorable constitutional claim against ... [the government's] need[] ... for confidentiality and the protection of its methods, sources, and mission." *Doe*, 486 U.S. at 604.

Petitioners Ashcroft and Mueller additionally contend that the court room doors are closed to a *Bivens* suit challenging "[h]igh-level policy decisions." Ashcroft Br. 24. But this suit does not challenge a policy decision in the abstract; it challenges the decision to authorize the harsh, unconstitutional abuse of the specific individuals who have brought suit. After all,

"[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70; *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."). And this Court has emphasized that even cabinet-level officers should not be absolutely immune when they violate the Constitution, even where they claim the violation was committed in the name of national security. *Mitchell*, 472 U.S. at 521-24. Indeed, the deterrence of constitutional violations through *Bivens* actions becomes even more important when those violations are the result of a systemic and organized policy—particularly when suits seeking prospective injunctive relief may be difficult to bring because of limitations on standing. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Thus, if federal officials authorized the punitive and discriminatory treatment alleged in this case, *Bivens* should provide a remedy for their unconstitutional conduct—just as the Attorney General in *Mitchell* was not immune "from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." *Mitchell*, 472 U.S. at 520.

### C. The Immigration Context Is Not a Special Factor Counseling Against a *Bivens* Remedy.

Petitioners also contend that the "implication of 'immigration issues'" is a "special factor" weighing against a *Bivens* cause of action. Hasty Br. 32; *see also* Ashcroft Br. 18, 29-30. But "immigration issues" are not implicated by the conditions of confinement imposed

upon Respondents. Petitioners' argument would leave any noncitizen in immigration detention without recourse for even the most egregious violations of constitutional rights, such as those alleged here. There is no reason why immigration detainees should lack the same access to judicial remedies for violations of clearly-established constitutional rights that any other detainee has.

Moreover, the immigration detention system holds hundreds of thousands of individuals each year. The possibility of *Bivens* suits against federal officers—like the possibility of state-law tort actions against employees of privately run immigration detention facilities—is essential to deter abuses. Numerous reported cases document shockingly abusive treatment by federal officers toward noncitizens in their custody. *See, e.g.*, *Martinez-Aguero*, 459 F.3d at 620-21 (holding that border patrol agent was not entitled to qualified immunity for yelling profanities while repeatedly kicking a handcuffed woman in the back and pushing her against a concrete wall, triggering epileptic seizures); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1172-73, 1188 (S.D. Cal. 2014) (denying summary judgment motion where plaintiffs presented sufficient evidence that border patrol agents' physical abuse of detained Mexican national—including evidence that the detainee was repeatedly punched, kicked, and stepped on—"[was] a substantial factor in causing [the detainee's] injuries and death"); *Jama v. U.S. INS*, 334 F. Supp. 2d 662, 666 (D.N.J. 2004) (asylum seekers alleged they were "tortured, beaten, harassed" and "subjected to abysmal living conditions" in

detention); Order, *Diouf v. Chertoff*, No. 07-03977 (C.D. Cal. May 6, 2008), ECF No. 82 (damages action under *Bivens* and FTCA by non-citizens who were forcibly drugged with powerful anti-psychotic medications during attempts to remove them); Complaint, *Doe v. Neveleff*, No. 11-cv-00907 (W.D. Tex. filed Oct. 19, 2011), ECF No. 1 (*Bivens* claim by three female asylum-seekers on behalf of a class, seeking redress for sexual assault while in ICE custody). Petitioners' argument would effectively immunize all of this misconduct from suit.[2]

Although the immigration agencies do have internal disciplinary procedures, their internal discipline has been toothless. For example, a study by the American Immigration Council covering 809 complaints of alleged abuse lodged against border patrol agents between January 2009 and January 2012 revealed that, in an astonishing 97% of cases resulting in a formal decision, no action was taken. Over 75% of these cases involved

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[2] American citizens also are affected when CBP and ICE officials are permitted to act with impunity. U.S. citizens have been detained and, in some cases, removed, by immigration officials. *See, e.g., Castillo v. Skwarski*, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 at *2-*11, *16 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran, detained for over seven months and ordered removed, brought *Bivens* suit); Order, *Guzman v. United States*, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010), ECF No. 170 (American citizen with mental disability who was detained and removed, settled damages suit); Complaint, *Riley v. United States*, No. 00-cv-06225 ILG/CLP (E.D.N.Y. Oct. 17, 2000), ECF No. 1 (*Bivens* and FTCA claims for unlawful detention, shackling and strip search of lawful permanent resident upon return to U.S., settled for monetary damages).

allegations of physical abuse or excessive force. *See* American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 1, 4, 8 (2014), http://tinyurl.com/z9ay4k9. And it is likely that the vast majority of cases go unreported: victims and their families—many of whom are without formal education, face language barriers, or lack legal sophistication—are not well-positioned to ensure that these internal processes are effective at remedying misconduct by federal officers.

This Court's recognition that the political branches exercise plenary power over the admission and exclusion of noncitizens, *see Galvan v. Press*, 347 U.S. 522, 530 (1954), also does not counsel against a *Bivens* remedy. The claims in this case do not involve the admission or exclusion of noncitizens; they involve the conditions of confinement imposed on foreign nationals in federal custody. Whatever else it may cover, the plenary power doctrine has never been interpreted to justify physical abuse of foreign nationals in federal custody.

Moreover, even if plenary power were relevant here, this Court has long recognized that its exercise is still "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (instructing that plenary power over immigration is restricted in its exercise "by the [C]onstitution itself."). Where constitutional rights are violated, *Bivens* should provide a remedy.[3]

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[3] In other contexts in which Congress exercises plenary power, Courts of Appeals have not hesitated to allow *Bivens* claims. For

Congress also has a strong national interest in deterring such mistreatment of foreign nationals by allowing *Bivens* suits. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court "reaffirmed that '[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'" *Id.* at 2498-99 (citation omitted) (bracket in original). The perceived mistreatment of foreign nationals located in the United States "may lead to harmful reciprocal treatment of American citizens abroad." *Id.* at 2498. The same logic applies with equal force to the actual mistreatment by federal agents of foreign nationals in detention. To selectively deny any remedy to such foreign nationals when U.S. citizens would be entitled to sue under *Bivens* undermines Congress's interest in the just treatment of U.S. citizens abroad.

Finally, rejecting Petitioners' argument that immigration is a "special factor" would not open the floodgates to a new type of *Bivens* claim. Several Courts

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example, the Eighth Circuit allowed a *Bivens* claim against a Bureau of Indian Affairs officer to proceed, *Wilkinson v. United States*, 440 F.3d 970, 971 (8th Cir. 2006), even though Congress exercises plenary power over the affairs of Native Americans, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Similarly, a *Bivens* suit against patent officers withstood a claim of absolute immunity in the Fourth Circuit, *Goldstein v. Moatz*, 364 F.3d 205, 211-19 (4th Cir. 2004), even though Congress has plenary power to "to legislate upon the subject of patents," *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). The military context, *see Stanley*, 483 U.S. at 681-84, is unique for the reasons described above, *see supra* at 14-15.

of Appeals already have recognized the availability of a *Bivens* cause of action in the immigration context. *See, e.g., Martinez-Aguero*, 459 F.3d at 625 (involving false arrest and excessive force against Mexican woman near U.S. port of entry); *Franco-de Jerez*, 876 F.2d at 1039, 1042-43 (allowing case to proceed to discovery against immigration officer on *Bivens* claim where noncitizen was held incommunicado for over ten days); *Ysasi v. Rivkind*, 856 F.2d 1520, 1528 (Fed. Cir. 1988) (vacating grant of summary judgment in favor of border patrol agents in *Bivens* action based, in part, on lack of showing that alternative remedies were available and equally effective); *Jasinski v. Adams*, 781 F.2d 843, 845-46 (11th Cir. 1986) (affirming denial of summary judgment in *Bivens* challenge to detention and search by immigration officer); *Guerra v. Sutton*, 783 F.2d 1371, 1375-76 (9th Cir. 1986) (vacating and remanding dismissal of *Bivens* claims against border patrol agents on qualified immunity grounds); *Tripati v. U.S. INS*, 784 F.2d 345, 346 n.1 (10th Cir. 1986) (finding civil rights action against immigration officer properly brought under *Bivens*)); *accord Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action."); *Matter of Sandoval*, 17 I. & N. Dec. at 82 (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available"). In the thirty years since the first of these decisions, there has been no resulting deluge of meritless cases or interference with the government's ability to enforce the immigration laws.

* * *

"[H]istory and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse." *Hamdi*, 542 U.S. at 530. For decades, *Bivens* has been an indispensible part of a framework of accountability for extreme misconduct by government officials. This Court should reject Petitioners' invitation to insulate government officials from accountability for constitutional violations whenever the talisman of policymaking, national security, or immigration can be invoked.

## CONCLUSION

For the foregoing reasons, and those set forth in Respondents' brief, the Court should hold that a *Bivens* cause of action is available to Respondents.

December 27, 2016

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# In the Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner*,

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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*(Additional captions listed on inside cover)*

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

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DENNIS HASTY AND JAMES SHERMAN,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

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## BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTERESTS OF THE *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church-state cases decided by this Court and by the federal courts of appeals throughout the country. Consistent with our support for the separation of church and state, Americans United has long fought to uphold the First Amendment and equal-protection guarantees that prohibit the government from favoring, disfavoring, or punishing based on one's beliefs with respect to religion.

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise and Establishment Clauses of the First Amendment forbid government conduct that singles out and discriminates against particular people based on their religion, a principle that has never been more important than it is today.

This case comes to the Court at a time when anti-Muslim sentiment is on the rise. Eric Lichtblau, *U.S. Hate Crimes Surge 6%, Fueled by Attacks on Muslims*, N.Y. Times (Nov. 14, 2016), http://tinyurl.com/NYTMuslimHateCrimes. Private discrimination and harassment are all too common. When, as here, that discrimination becomes government-sanctioned, government-sponsored oppression, it is all the more intolerable. Thus, not only is it critical that the victims of that oppression have the opportunity to seek judicial remedies for the injuries and indignities that they suffer at the government's hands, but it is paramount that this Court send a strong message that official disfavor and the meting out of punishment on the basis of religion are antithetical to our constitutional order.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents suffered horrific indignities. They were kept in solitary confinement, deprived of sleep, exposed to extreme temperatures, taunted, strip-searched, and shackled. Some were beaten to the point of broken bones. All of that occurred for no reason other than respondents' perceived religion and nationality. Petitioners now invite this Court to ex-

cuse these gross violations, contending that it was not clearly established that the government was forbidden to treat respondents in that manner. The Court should refuse petitioners' invitation.

The equal-protection component of the Due Process Clause and the Religion Clauses of the First Amendment prohibit the government from making invidious distinctions based on religion or belief. In protecting the fundamental right to religious liberty, "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, * * * and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Petitioners straightforwardly violated this strict constitutional prohibition by detaining and torturing respondents for months based on respondents' religion and national origin—even *after* respondents were determined to be no threat whatever to anyone. Doubling down on this invidious distinction and contending that general concerns for national security justified their mistreatment of respondents—again, even after they knew that respondents were not a danger—petitioners now contend that they did not violate any clearly established law.

But it is well settled that the government is prohibited from doling out punishment based on religion. And it is equally established that government cannot officially disfavor any particular religious group or denomination. Petitioners did both.

In analyzing whether petitioners violated the equal-protection component of the Due Process Clause by punishing respondents based on their religion and national origin, the Court should not ignore clearly established law under the other constitutional clauses that speak with the same voice to prohibit the extreme conduct here. To do so would not advance the purposes of qualified immunity but instead would cause doctrinal confusion and create perverse incentives for future deprivations of fundamental rights.

## STATEMENT

After the attacks of 9/11, the U.S. Department of Justice initiated a "massive investigation." J.A. 43. As part of that investigation, respondents—men of Middle-Eastern descent who are, or were perceived to be, Arab Muslims—were arrested for mostly trivial immigration violations. Pet. App. 2a n.1, 4a. They were held in solitary confinement for months "even though they were unquestionably never involved in terrorist activity" (*id.* at 2a), and their detentions continued even after they were cleared of any conceivable wrongdoing.

**1. The Investigation:** The post-9/11 investigation that resulted in the roundup of Arab Muslims involved officials at the highest levels of government, including former Attorney General John Ashcroft and former FBI Director Robert Mueller. Pet. App. 8a. Petitioner Ashcroft directed federal law-enforcement agencies to use "every available law enforcement tool" to find and capture possible terrorists. J.A. 43. Petitioner Mueller directed the FBI to investigate every one of the 96,000 tips that the Bureau received in the week following the 9/11 attacks,

no matter how implausible the tips might be. Pet. App. 8a-9a.

The investigation "had a significant immigration law component." J.A. 60. Ashcroft and Mueller instituted and implemented a broad policy that focused on immigration violations, "'whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation * * * and discovered to be a non-citizen who had violated the terms of his visa, was arrested.'" Pet. App. 8a (quoting Compl. ¶ 1). Ashcroft issued a stern warning: "If you over-stay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible." J.A. 60.

The resulting protracted detentions were, apparently, not enough for Ashcroft and Mueller, who also met with other government officials to "'map[] out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation.'" Pet. App. 9a (quoting Compl. ¶ 61). In those meetings, they "'discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings.'" *Ibid.* And they informed subordinate law-enforcement personnel that the detainees were suspected terrorists who "'needed to be encouraged in any way possible to cooperate.'" *Ibid.*

**2. Confinement at the Metropolitan Detention Center:** The point of Ashcroft and Mueller's policy was not lost on anyone: Many detainees—including respondents—were held in horrifying conditions for prolonged periods at the MDC in New York. They were kept in an especially harsh form of solitary confinement in the MDC's Administrative

Maximum Special Housing Unit—the ADMAX SHU. Pet. App. 10a. The detainees spent more than twenty-three hours per day in "'tiny cells.'" *Ibid.* (quoting Compl. ¶ 5). The cell lights were left on around the clock so the detainees couldn't sleep. *Ibid.* And at times, when inmates would fall asleep despite the lights, guards would make regular rounds to kick the cell doors, roust the detainees, and yell offensive comments at them. *Ibid.* The detainees were denied adequate clothing, and some were locked in freezing temperatures as punishment. *Id.* at 296a-298a, ¶¶ 122-27. They were denied access to basic necessities, such as eating utensils, hygiene products, and eyeglasses. *Id.* at 10a; 298a, ¶ 130. And they were denied access to the MDC inmate handbook, which would at least have explained how to file complaints about the maltreatment to which they were being subjected. *Id.* at 10a.

Detainees also suffered severe physical abuse at the MDC. On arrival, they were often slammed into or bounced off walls by the guards transporting them to the ADMAX SHU. J.A. 354-56. Some had their faces forcefully shoved into a wall with a blood-spattered American-flag T-shirt bearing the slogan "these colors don't run." *Id.* at 356-57. Detainees had their limbs or fingers twisted or bent by MDC staff. *Id.* at 367. Whenever the detainees were moved, they were shackled; and MDC staff sometimes lifted the detainees by the chains, inflicting physical pain. *Id.* at 370. And MDC guards hurt the detainees by stepping on their leg chains. *Id.* at 373. Two former MDC lieutenants have since frankly admitted that "some officers took their anger and frustration about the September 11 terrorist attacks out on the detainees." *Id.* at 380.

The abuse was not just physical but also spiritual: Respondents and other Arab Muslim detainees were subjected to ridicule and punishment aimed specifically at their faith and religious exercise. For example, soon after respondents arrived at the MDC, they requested copies of the Koran (Pet. App. 299a, ¶ 132), just as inmates of other faiths have the right to request and receive their holy scriptures. But under an official policy, some Muslim detainees were made to wait weeks for a Koran; others never received one at all. *Id.* at 11a. The detainees were denied access to Halal food. *Ibid.* Guards refused to tell the detainees the date, purposefully leaving the detainees unable to determine when Ramadan began. *Id.* at 299a-300a, ¶ 134. There were no clocks in the ADMAX SHU, and the guards refused to inform respondents of the time so that they could pray when required by their faith. *Id.* at 299a, ¶ 134. When respondents did pray, they were often interrupted by the guards, who banged on the cell doors, screamed derogatory remarks, told the detainees to "shut the fuck up," and generally mocked and verbally abused them. *Id.* at 300a, ¶ 136. Complaints of these and other abusive practices were brought to MDC management, including petitioner Hasty. *Id.* at 300a, ¶ 137. But the abuses continued nonetheless.

**3. Respondents:** There is no question that respondents had no involvement whatever in any terrorist activity. Pet. App. 2a. Instead, they were all arrested for being "'out-of-status' alien[s]," meaning that they had either entered the country illegally or overstayed their visas. *Ibid.* n.1. The only other trait that all the respondents shared is that they were, or were perceived or assumed to be, Arab Muslims.

## ARGUMENT

This case stands at the intersection of religion, national origin, ethnicity, and race. The policy that petitioners instituted and enforced was one that singled people out for incredibly harsh treatment based on these protected characteristics. For that reason, this case fits squarely under the constitutional guarantee of equal protection of the laws.

*Amici* agree with respondents that petitioners violated clearly established equal-protection law. *Amici* write separately to explain why the case against qualified immunity here is even clearer than respondents and the Second Circuit suggest.

Petitioners marked respondents for arrest and detention and inflicted physical and psychological harms on them based on respondents' actual or assumed religious affiliation in conjunction with their national origin. Petitioners' conduct is thus at the heart of what this Court has long and consistently recognized to be prohibited by the Religion Clauses of the First Amendment; by doing precisely what these Clauses forbid, Petitioners violated clearly established law under both the Free Exercise Clause and the Establishment Clause.

The clarity of the Free Exercise and Establishment Clause violations here should necessarily inform the qualified-immunity analysis for respondents' equal-protection claims. Because the Religion Clauses of the First Amendment and the equal-protection component of the Due Process Clause all speak with one voice, announcing with ringing clarity that petitioners' conduct was indefensibly wrong,

the Court should consider the First Amendment violations in its qualified-immunity analysis.[2]

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[2] In addition to their equal-protection claims, respondents brought Free Exercise Clause claims based on the denials of access to the Koran and Halal food and the purposeful interruptions of prayer. The court of appeals summarily held, however, that there can be no *Bivens* action for free-exercise violations, based on the panel's view that this Court has definitively "'declined to extend *Bivens* to a claim sounding in the First Amendment.'" See Pet. App. 27a-28a (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)).

The court below misread this Court's precedents. In *Iqbal*, the Court "assume[d], without deciding," that a First Amendment claim *is* actionable under *Bivens*. 556 U.S. at 675. And in *Bush* v. *Lucas*, 462 U.S. 367, 388-90 (1983), the Court denied a *Bivens* remedy not because the plaintiff had brought a First Amendment claim but because the plaintiff had an alternative remedy available and hence did not need *Bivens* to seek relief. There is no similar alternative remedy here: "For people in [respondents'] shoes, it is damages or nothing." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

We note that if respondents had adequate access to counsel while in detention, they could have sued for violations of their First Amendment rights and obtained full injunctive relief. But because respondents were also denied their rights to counsel and to file grievances, they lost their ability to sue at all. If the Second Circuit's misguided view about the unavailability of *Bivens* actions for First Amendment violations goes uncorrected and this Court were to hold also that there is no *Bivens* remedy under the Fifth Amendment, the clear message to law enforcement and prison administrators will be: "If you want to commit flagrant violations of detainees' religious-freedom rights, just make sure that you also deprive them of access to counsel and the courts."

### A. Petitioners' conduct violated the Religion Clauses of the First Amendment.

"[T]he First Amendment mandates governmental neutrality" with respect to religion, religious denominations, and beliefs about religion. *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); accord, *e.g.*, *McCreary Cty., Ky.* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Larson* v. *Valente*, 456 U.S. 228, 246 (1982). The Religion Clauses serve as a bulwark against governmental overreach, protecting one of our most fundamental rights—the right to religious freedom. The Establishment and Free Exercise Clauses work in tandem to ensure that the government does not single out any religious group for official disfavor—much less for detention, abuse, and torture.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Thus, when the government designates one denomination for different treatment, whether favorable or unfavorable, its action is subject to strict scrutiny and cannot stand. *Id.* at 246. Simply put, "the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals." *McCreary*, 545 U.S. 875.

The Free Exercise Clause likewise mandates that the government must not single out a particular group for unfavorable treatment based on religion. Indeed, the Clause prohibits even "'subtle departures from neutrality.'" *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Gillette* v. *United States*, 401 U.S. 437, 452 (1971)). That is because "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise

Clause.'" *Id.* at 532 (quoting *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986)). Unless the singling out of a religious group—a "religious gerrymander"—can meet the high bar of strict scrutiny, it violates the Free Exercise Clause (*id.* at 534, 546)—just as a denominational preference that fails to survive strict scrutiny violates the Establishment Clause (*Larson*, 456 U.S. at 246).

To determine whether a policy is forbidden religious discrimination, the Court first looks to the policy's language. If by its terms the policy identifies a particular religious group for regulatory control and punishment, then it is neither neutral nor generally applicable with respect to religion. And even if it is facially neutral, it cannot survive judicial scrutiny if in actual operation it singles out a religious group for punishment or coercion and does not apply equally to similarly situated persons of other faiths. See *Lukumi*, 508 U.S. at 534-38. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534; see also *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972).

Here, respondents straightforwardly alleged facts showing that petitioners' policies and practices disfavored Muslims (and those perceived to be Muslim) and that these policies and practices were neither neutral nor generally applicable because they explicitly applied solely to perceived Arab Muslims. See Pet. App. 252a, ¶ 1; see also Resp. Br. 3-6. And the policy's implementation treated one religious group—Muslims—as "of interest" to law enforcement (see Pet. App. 252a, ¶ 1), meaning that respondents and others were presumptively slated for detention and prolonged incarceration in the most harsh conditions and denied the ability to practice their faith

while confined solely because they were, or were perceived to be, of an officially disfavored religion and associated ethnicity. This treatment was dramatically different from what non-Muslims with similar immigration status could expect. See Pet. App. 266a-67a, ¶ 43. Petitioners deny none of that.

The policies and practices here would therefore have to satisfy "the most rigorous of scrutiny," meaning that petitioners would have to "advance 'interests of the highest order'" and show that their conduct was "narrowly tailored in pursuit of those interests"—*i.e.*, that the "interests could [not] be achieved by narrower [restrictions] that burdened religion to a * * * lesser degree." *Lukumi*, 508 U.S. at 546 (citing *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). The singling out of one group for disfavor and punishment on the basis of religion could survive strict scrutiny, if at all, "only in rare cases." *Id.* at 546.

This is not such a case. Though petitioners maintain that they were acting in furtherance of national security (see, *e.g.*, Hasty Br. 29; Ashcroft Br. 37-38), incanting the mantra of "national security" is not enough. To be sure, national security can be a compelling interest. "To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992); see also *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) ("we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose" if it is to survive strict scrutiny); cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006) ("RFRA, and the strict scrutiny test it adopted, * * * require[] the Government to demon-

strate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant").

Otherwise, the government could always overcome strict scrutiny by the simple expedient of invoking a vague phrase that under some set of conditions might state a compelling governmental interest, be it "protecting voters from confusion and undue influence" (*Burson*, 504 U.S. at 199); "preserving the integrity of [the] election process" (*Eu* v. *San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); "prison safety and security" (*Holt* v. *Hobbs*, 135 S. Ct. 853, 863 (2015)); preserving "public perception of judicial integrity" (*Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015)) or "public confidence in the fairness and integrity of the nation's elected judges" (*Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)); "ensuring that criminals do not profit from their crimes" or that "victims of crime are compensated by those who harm them" (*Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991)); "attaining a diverse student body" (*Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003)); "combating corruption" (*Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011)); "protecting the physical and psychological well-being of minors" (*Sable Commc'ns of Cal., Inc.* v. *F.C.C.*, 492 U.S. 115, 126 (1989)); "encouraging compromise and political stability" and preventing "splintered [political] parties and unrestrained factionalism" (*Storer* v. *Brown*, 415 U.S. 724, 729, 736 (1974)); "protection of children" (*Denver Area Educ. Telecomms. Consortium, Inc.* v. *F.C.C.*, 518 U.S. 727, 755 (1996)); "protecting * * * the appearance of confidentiality so essential to the effective operation of our foreign intelli-

gence service" (*Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980)); or regulating "the practice of professions within [a State's] boundaries" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975))—not to mention the even more general and amorphous, but surely important, governmental interests in public health, safety, and, as asserted here, national security.

Here, the government's asserted interest in national security is not served by a policy of detaining people in solitary confinement and torturing them based on the fact that they are (or appear to be) Arab Muslims when there is not a whiff of evidence that they are a threat to anyone. Mass incarceration of people thought to be Arab Muslims would be grossly overinclusive to justify *any* detention, much less the extraordinarily harsh conditions of confinement here. And even if that were not so, the government's interest in preventing further acts of terrorism after 9/11 could surely have been "achieved by narrower [restrictions] that burdened religion to a far lesser degree" (*Lukumi*, 508 U.S. at 546) than a policy of keeping people confined in abusive conditions long after they have been cleared of any terrorist associations and petitioners have affirmatively determined them not to be a threat. Hence, strict scrutiny cannot be satisfied, and petitioners' conduct could not stand under the Establishment or Free Exercise Clauses.

### B. Petitioners' duties and respondents' rights under the Religion Clauses were clearly established.

That petitioners were prohibited from singling out respondents for detention in abhorrent and abusive conditions—or at all—based on the fact that

they are Arab Muslims was clearly established under both the Free Exercise and Establishment Clauses in 2001, when the unconstitutional conduct occurred. *Larson* was decided in 1982; *Lukumi* was decided in 1993; and each specified constitutional prohibitions that this Court had already expressly recognized decades earlier. See, *e.g.*, *Epperson*, 393 U.S. at 104; *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) ("No person can be punished for * * * religious beliefs").

To put it plainly, any reasonable law-enforcement official—and even unreasonable ones—should have understood in 2001 that it is unconstitutional to round people up, incarcerate them, place them in solitary confinement, harass and abuse them, and deny them the ability to worship and practice their faith, even after determining that they are not a security threat, thereby treating the detainees radically differently from others with similar immigration status, all based on the detainees' adherence to a disfavored religion and associated ethnicity. As explained above, it is long and clearly settled that the Establishment Clause forbids singling out a religious group for disfavor and that the Free Exercise Clause forbids punishing based on religious affiliation or belief. See Section A, *supra*.

Notably, petitioners do not deny that their policies and practices targeted Arab Muslims because they were Arab Muslims. Petitioners do not explain how their expansive program of abusing Muslims genuinely served any legitimate governmental interest, much less a compelling one. And petitioners do not show that their actions were narrowly tailored to the objectives that they say they were pursuing. Instead, they argue that their misdeeds occurred under unusual circumstances and therefore that the par-

ticular rights of respondents that they trammeled could not have been clearly established.

But this Court has expressly recognized that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). For a right to be clearly established, it is necessary only that "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right"; the "very action in question" need not have "previously been held unlawful" as long as, "in the light of pre-existing law[,] the unlawfulness [was] apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Here, it certainly was, for the reasons already explained.

Petitioners Ashcroft, Mueller, and Ziglar also contend that because respondents had committed immigration violations, they were lawfully arrested; and because there were legitimate national-security concerns about terrorism after the 9/11 attacks, there was no clearly established prohibition against detaining in conditions of torture people who have overstayed their visas, based on their religion and associated ethnicity, even after petitioners knew that "the government lacked information" connecting them to terrorism. Ashcroft Br. 37-38; see also Ziglar Br. 22. Those arguments boil down to this: It was not clearly illegal, petitioners contend, to hold respondents in the extraordinarily abusive conditions of solitary confinement here based on their perceived religion and national origin.

Nonsense. The assertion that perceived Arab Muslims were an inherent threat to national security solely by virtue of their religion and associated ethnicity was inadequate to justify detention even be-

fore respondents were determined to be utterly innocent of terrorism; for the period after that determination, petitioners' argument is beyond fanciful. Months of solitary confinement based on perceived religion and national origin are not rendered lawful, or understandable, or excusable just because a genuine infraction was available as a pretext for the initial arrest. Nor does the talismanic invocation of "national security" trump all constitutional requirements that government not mete out punishment for membership in a disfavored religious group. Denominational preferences and religious discrimination by government officials are concretely, straightforwardly, unequivocally unconstitutional—and were so long before 2001.

Petitioners Hasty and Sherman fare no better with their arguments. They invoke *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), for the proposition that any post-9/11 response "detain[ing] individuals because of their suspected link to terrorism would produce a disparate, incidental impact on Arab Muslims." Br. 39. And hence, petitioners argue, detaining Arab Muslims was lawful, or at least not clearly established to be unlawful. *Ibid.*

But respondents were not held because they had a suspected link to terrorism. And respondents' faith and associated national origin were not incidental to reasonable suspicions that respondents were terrorists. Those characteristics, without any evidence of terrorist affiliations or connections whatever, were instead the *cause* of the maltreatment by petitioners. And that maltreatment continued even well after respondents were cleared of any terrorist connections. In other words, petitioners continued to detain respondents in extreme, abusive conditions after peti-

tioners absolutely knew that they had no cause—legally justified or otherwise. Pet. App. 259a-60a, ¶¶ 24, 26. Petitioners had not even a fig-leaf of cover for their brute-force religious discrimination and oppression. And that, the Religion Clauses clearly forbade.

### C. Violations of the Religion Clauses are properly considered in determining qualified immunity from respondents' equal-protection claims.

Petitioners' violations of clearly established First Amendment law are highly pertinent and should be considered by this Court in determining whether there is qualified immunity from respondents' equal-protection claims because the Religion Clauses and the equal-protection component of the Due Process Clause speak here with one voice. Accordingly, it is not only natural and logical to consider the settled law under the three Clauses together, but to do otherwise would create doctrinal confusion—while also disserving the aims and objectives of qualified immunity.

When analyzing a qualified-immunity defense, courts generally look to whether there is a clearly established duty under "the federal right on which the claim for relief is based." *Elder* v. *Holloway*, 510 U.S 510, 515 (1994). That is because allowing plaintiffs to bootstrap their federal claims on random, unrelated legal authority to overcome qualified immunity might make the qualified-immunity determination turn on, for example, "the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment." *Davis* v. *Sherer*, 468 U.S. 183, 195 (1984). "It would [then] become more difficult * * *

for officials to anticipate the possible legal consequences of their conduct" given the "plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." *Id.* at 196 (footnote and citation omitted). That would defeat the central purpose of the qualified-immunity doctrine: ensuring that "officials can act without fear of harassing litigation" by allowing suits for damages to go forward "only if [the officials] reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Id.* at 195.

This Court has also recognized, however, that looking to other provisions of clearly established law is appropriate when those provisions are intertwined with or inform the federal right under which the particular legal claim has been alleged. Thus, for example, the Court recognized in *Davis* that "[s]tate law may bear upon a claim under the Due Process Clause when the property interests protected by the Fourteenth Amendment are created by state law." 468 U.S. at 193 n.11 (citing *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972)). In that circumstance, determining whether there are clearly established due-process rights involves also determining whether there are clearly established state-law rights, so both bodies of law are to be considered.

Similarly, when a constitutional provision has been incorporated against the states by the Fourteenth Amendment, the Court looks to the clearly established law of the incorporated amendment, not just to decisions expounding and applying the Fourteenth Amendment *per se*. See, *e.g.*, *Chavez* v. *Martinez*, 538 U.S. 760, 766-67 (2003). The Court also re-

lies on cases specifying due-process law in the qualified-immunity analysis without regard to whether the particular legal claim at hand is brought under the same Amendment—the Fifth or the Fourteenth—as were the cases expounding the established law to which the Court looks for guidance. See, *e.g.*, *Davis*, 468 U.S. at 202. And the Court has looked even to state regulations and a federal administrative agency's report to determine that there was no qualified immunity for an alleged Eighth Amendment violation when reasonable officials would have had "fair warning" from those materials that their conduct was unconstitutional. *Hope*, 536 U.S. at 743-44.

The Court should do the same here, because "the Free Exercise Clause, the Establishment Clause, * * * and the Equal Protection Clause as applied to religion[ ]all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment).[3]

In prohibiting invidious distinctions based on religion, "the Establishment Clause mirrors the Equal Protection Clause." *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment). And the fundamental "right to equal protection of the laws" to exercise one's freedom of religion is protected by both

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[3] Although *Grumet* was decided under the Equal Protection Clause of the Fourteenth Amendment, "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

"the First and Fourteenth Amendments." *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951).

In short, the First Amendment caselaw "bears upon" and necessarily informs "the claim of constitutional right" (see *Davis*, 468 U.S. at 193) asserted here under the equal-protection component of the Due Process Clause because the substantive right at issue is functionally the same under all the Clauses. And hence, the Court should not hesitate to look to clearly established First Amendment law to analyze petitioners' qualified-immunity defense.

To do otherwise—to ignore clearly established First Amendment law that cannot be disentangled from the correlative equal-protection law—would give rise to doctrinal confusion that would not only undermine the substantive constitutional rights at issue, but also run directly counter to the objectives of the qualified-immunity doctrine. If courts were forbidden to look to First Amendment law when official religious discrimination and religiously based oppression is challenged by means of an equal-protection claim, then the courts may come to entirely different conclusions about whether a specific act is illegal under constitutional provisions that are supposed to point exactly the same way.

This case shows that problem in spades. Petitioners designated huge numbers of people for prolonged detention, abuse, and denial of the right to practice their faith, based on religious affiliation and national origin—two protected characteristics that are closely related for the detainees (indeed, that close connection is precisely why petitioners focused on these characteristics). If the courts were required to don constitutional blinders and decide the qualified-immunity question for claims stated under the

Fifth Amendment without reference to the extensive and long-standing body of caselaw under the First Amendment, then a court might, for example, decide that while there is no qualified immunity for claims of maltreatment on the basis of religion because those claims happen to have been brought under the Religion Clauses, there *is* qualified immunity for claims of the very same maltreatment on the basis of religion and national origin because the injured parties had concluded, reasonably, that the addition of national-origin discrimination made their constellation of claims fit naturally under equal protection.

That nonsensical approach to qualified immunity, if adopted, might also lead the lower courts to conclude, at the merits stage, that they must view the substantive law concerning invidious discrimination and official abuse and oppression on the basis of religion entirely differently depending on whether a claim happens to be brought under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause of the Fourteenth Amendment, or the equal-protection component of the Due Process Clause. The courts might then reason that the legal authority that happens to have been issued under one of the Clauses cannot be considered in analyzing the merits of the claims under the other Clauses. Thus, far from properly recognizing that the Clauses "mirror[ ]" each other in the protections that they provide (*Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment)), the courts might understandably conclude that this Court has mandated that they consider and develop the doctrine independently, even when doing so produces absurdly contradictory results.

Nor would artificial segregation of the intertwined specifications of the constitutional rights further the aims of the qualified-immunity doctrine. That doctrine encourages government agents to carry out their official duties vigorously by removing the constant fear of liability for damages while at the same time recognizing the need to hold those officials accountable and to provide remedies for gross violations of citizens' fundamental rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). Although government agents ought not face unexpected risks of personal liability that cause "undue interference" with the performance of their duties, there must still also be a "damages remedy to protect the rights of citizens." *Id.* at 806-07. The point of qualified immunity, after all, is "to safeguard government, and thereby to protect the public at large, not to benefit [the government's] agents." *Wyatt* v. *Cole*, 504 U.S. 158, 168 (1992).

Qualified immunity is meant to prevent overdeterrence of official conduct by those who act on a good-faith but ultimately incorrect understanding of the law. It was never intended to license extraordinarily obvious and wholly indefensible constitutional violations by insulating government agents, like petitioners here, from the consequences of their actions. That the officials' gross misdeeds violate multiple overlapping constitutional duties is strong reason that there *should* be liability; it is not justification for *denying* any possibility of liability from the get-go.

* * *

Petitioners were the architects and drivers of a policy that resulted in respondents' being held for months in abject and inhumane conditions because

respondents were Arab Muslims. Respondents were treated as guilty of heinous acts of terrorism until proven innocent and were treated worse than the Constitution allows even for those who have actually been prosecuted and found guilty. And when it was clear to petitioners that respondents had no connections at all to terrorism, petitioners *still* held respondents in solitary confinement—for months. As for the excuse that respondents had committed immigration violations, similarly situated people of different faiths and ethnicities received entirely different treatment for those very same immigration infractions. Petitioners' actions were unreasonable, unjust, and un-American. Any reasonable officer would have understood as much. The Court should allow respondents to prove their case and hold petitioners accountable for their actions.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RECORD AND BRIEFS

Nos. 15-1358, 15-1359 & 15-1363

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR, *et al.*,
*Petitioners*,

v.

AHMER IQBAL ABBASI, *et al.*,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICI CURIAE* ASIAN AMERICANS ADVANCING JUSTICE AND OTHER ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICI CURIAE[1]

*Amici curiae* are American-Arab Anti-Discrimination Committee (ADC); Arab American Association of New York (AAANY); Arab-American Institute (AAI); Asian Americans Advancing Justice (AAJC); Asian Pacific American Bar Association of Pennsylvania (APABA-PA); Asian Pacific American Women Lawyers' Alliance (APAWLA); Constitutional Law Center for Muslims in America (CLCMA); Council on American-Islamic Relations (CAIR); Creating Law Enforcement Accountability & Responsibility project (CLEAR); DRUM — Desis Rising Up and Moving; Muslim Advocates; Muslim American Society of Boston (MAS-Boston); Muslim American Society of New York (MAS-NY); Muslim Bar Association of New York (MuBANY); Muslim Consultative Network (MCN); Muslim Justice League; Muslim Legal Fund of America (MLFA); Muslim Public Affairs Council (MPAC); National Asian Pacific American Bar Association (NAPABA); National Association of Muslim Lawyers (NAML); National Coalition to Protect Civil Freedoms (NCPCF); National Network for Arab American Communities (NNAAC); New Jersey Muslim Lawyers Association (NJMLA); Project SALAM (Support and Legal Advocacy for Muslims); Sikh Coalition; South Asian Americans Leading Together (SAALT); South Asian Bar Association Of New York (SABANY); and UNITED SIKHS.

*Amici* are a coalition of organizations that work with and represent, or partner with, the Arab, Middle Eastern, Muslim, Sikh and South Asian communities in the United States ("AMEMSSA" communities). *Amici* are all concerned with

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amici curiae, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

the disproportionate law enforcement and immigration measures directed against AMEMSSA communities since the September 11, 2001 attacks, including those at issue in this case—practices animated by gross stereotypes and generalizations that have, in turn, furthered private discrimination against these communities.

This vicious cycle of prejudice has fueled a political climate in which public figures increasingly debate proposals requiring the registration, internment, and exclusion of AMEMSSA community members within and from the United States. This mutually reinforcing pattern of public and private discrimination has seriously harmed members of the communities *amici* serve and represent, and *amici* fear that such stereotyping and stigmatization will only intensify. The availability of judicial remedies is an essential last check on executive overreach where individuals plausibly allege intentional discrimination by government officials.

## SUMMARY OF ARGUMENT

The petitioners in these consolidated cases subjected respondents to severe and gross stereotyping. On the basis of their real or apparent religion and national origin, and a broad, impermissible conflation between the threat of terrorism and Muslim and Arab individuals as a whole, the FBI arrested and detained respondents for months. The use of race, religion, national origin, and similar demographic characteristics as proxies for suspicion—as occurred here—was not an isolated or anomalous occurrence. In the last fifteen years, in particular, federal and local governments have repeatedly targeted AMEMSSA communities through a variety of policies and practices. Frequently rooted in generalizations that individuals of an Arab, South Asian, or Muslim appearance or background are likely linked to terrorism, these measures have ranged from prolonged questioning and detention to pervasive surveillance and registration requirements.

Government endorsement of policies rooted in stereotypes linking American Muslims and Arabs with terrorism has given an imprimatur to stereotypes in the private sphere; large numbers of Americans view American Muslims through the lens of such threadbare caricatures. Government programs that rely on these stereotypes, in turn, have contributed to a significant increase in private discrimination against AMEMSSA communities: in the past five years, unfavorable views of Muslims and support for discriminatory measures have intensified. A dangerous feedback loop thus has emerged, where government policies that approach AMEMSSA communities through the lens of suspicion fuel private discrimination, giving rise to public and government institutions increasingly amenable to discriminatory policies and practices. AMEMSSA communities are gravely concerned about this toxic culture of suspicion and stigma through which they are too often viewed and treated.

This case presents the question of whether respondents may seek relief under the remedy authorized in *Bivens v. Six Unknown Named Agents of Federal Bureau Narcotics*, 403 U.S. 388 (1971), for the harms they suffered as a result of government policies and practices that targeted them based on their race, religion, ethnicity, or national origin. Judicial review is a necessary check on executive overreach, and that truism is nowhere more important than here. The judiciary is uniquely capable of stepping in to remedy harms suffered by "discrete and insular" minorities where the other branches of government have failed and where such harms may reinforce private biases. AMEMSSA communities cannot rely on the other branches to alleviate the harms they have faced and continue to face.

Popular sentiment against AMEMSSA communities and congressional reticence to interfere in areas of national security mean that Congress has few incentives to act here. And, as respondents' case highlights, the executive branch has not—and likely will not—rein in its own overreach and

the disproportionate burdens of any national security and immigration policies on AMEMSSA communities. Judicial relief is necessary to prevent federal officials from acting with impunity and to mitigate the baseless suspicion with which AMEMSSA communities are viewed. In a climate of escalating political and public rhetoric demeaning and stereotyping Muslims, it is vital for this Court to affirm that AMEMSSA individuals are entitled to equal protection under the law. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–06 (2015) (rejecting calls for a "cautious approach" when it comes to protecting fundamental rights, especially when faced with a "long history" of public approval of discrimination).

## ARGUMENT

### I. National Security Policies, Including Those Linked to Immigration, Have Disproportionately and Unfairly Targeted AMEMSSA Communities.

AMEMSSA communities encompass a diverse array of individuals with different backgrounds, nationalities, professions, beliefs, and legal statuses. They include Arab Americans of varying national origins and religions including both Islam and Christianity; non-Arab Middle Eastern peoples from a number of countries including Iran; American Muslims of a variety of races and backgrounds, including a significant number of African Americans and African immigrants; and South Asians of diverse national origins and religious traditions, including adherents of Islam, Hinduism, Buddhism, and Sikhism. *See* Asian Am./Pac. Islanders in Philanthropy, *AMEMSA Fact Sheet* (2011), http://aapip.org/files/incubation/files/amemsa20fact20sheet.pdf; *see also* Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, Pew Research Ctr. (Jan. 6, 2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/ (estimating the American Muslim population at 3.3 million and projecting

that the figure would double by 2050). These groups consist of citizens and non-citizens, individuals born inside and outside of the United States, and many other individualized distinctions too numerous to list.

Despite the diversity across and within these communities, government policy and private prejudice have often consolidated these groups into a single racialized construct. Government and popular responses to the September 11, 2001 attacks consolidated "a new identity category that groups together persons who appear 'Middle Eastern, Arab, or Muslim.' " Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576 (2002); *see also* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Calif. L. Rev. 1259, 1278–79 (2004) (describing the emergence of a new racial identity focused on the "the 'Muslim-looking' person," an identity that "capture[d] not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latinos and African-Americans, depending on how closely they approach[ed] the phenotypic stereotype of the terrorist."). Thus, as with other racialized groups, AMEMSSA communities became identified together as a result of social and political developments, and in spite of distinctions among them.

In the last fifteen years, the federal government has too often lumped together AMEMSSA communities for suspicion and profiling without making individualized determinations or finding a clear connection to terrorism. As in the facts of this very case, individuals from these communities are targeted based on their appearance, perceived identity, and on a generalized stereotype that individuals of an Arab or Muslim background are more likely to be linked to terrorism.

Respondents here include Pakistani Muslims, Egyptian Muslims, an Algerian Muslim, and a Nepalese Buddhist. Br.

In Opp. 9–11. The FBI arrested and detained them based on vague tips from neighbors or based on their appearance or perceived identity. *See id.* (noting that respondents Abbasi, Mehmood, Khalifa, and Bajracharya were investigated in response to vague tips to the FBI regarding "Arabs" or "Arab males"). Respondents had no connection to terrorism or the September 11 attacks. Nonetheless, they were detained for months on end in facilities where they were regularly subjected to physical, verbal, and religious abuse. *Id.* During his detention, for example, respondent Mehmood's hand was broken. Other respondent detainees were slammed into walls, and correctional officers at the facilities subjected them to insults against Arabs and Muslims, among other abuses. *Id.* at 8.

These experiences were by no means an anomaly. Respondents were rounded up and detained as part of a broader investigation purportedly aimed at identifying individuals involved in the September 11 attacks or other acts of terrorism. But reviews of these efforts by the Office of the Inspector General (OIG) later showed that the leads upon which law enforcement officials acted—and the resulting arrests—were often based on generalized stereotypes regarding Arab and Middle Eastern men. *See* J.A. 66–68 (highlighting that leads leading to arrests "were quite general in nature" and often related to Arab or Middle Eastern appearance); *see also id.* at 303 (noting that "the FBI and INS in New York City did little to distinguish the aliens arrested as the subjects of * * * leads or where there was evidence of ties to terrorism from those encountered coincidentally to such leads with no indication of any ties to terrorism").

For example, one of the original plaintiffs in the instant case, Ibrahim Turkmen, first came to the FBI's attention when his landlord reported to the FBI that she "rented her apartment in her home to several Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.' " *Turkmen v. Ashcroft*, 789 F.3d

218, 227 n.9 (2d Cir. 2015) (citing Pls.' Compl.). Another man was arrested and classified as a "9/11 detainee" after someone reported that a grocery store was "operated by numerous Middle Eastern men, 24 hours – 7 days a week" and that this was "too many people to run a small store." J.A. 68. Ultimately, these arrests resulted in the government's detention of a total of 762 individuals during the eleven months following September 11, with detainees being subject to various forms of mistreatment at detention facilities. *Id.* at 44–45.

Respondents' experiences collectively constitute a particularly powerful example of AMEMSSA communities being unlawfully profiled by national security policies. Yet they are also illustrative of a broader set of policies and practices that have targeted AMEMSSA communities for the past fifteen years or more. Indeed, AMEMSSA communities are regularly subject to policing and suspicion from federal and local law enforcement in a way that unfairly associates these communities as a whole with the threat of terrorism. *See, e.g.*, Amna Akbar, *Policing "Radicalization"*, 3 U.C. Irvine L. Rev. 809, 854–857 (2013). These policies demonstrate the disproportionate law enforcement attention AMEMSSA communities have received and continue to experience.

For instance, beginning in 2002 and as part of the National Security Entry-Exit Registration System (NSEERS) program, the federal government required the "special registration" of non-citizen males on nonimmigrant visas from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. *See, e.g.*, 68 Fed. Reg. 2363 (Jan. 16, 2003); 67 Fed. Reg. 77642 (Dec. 18, 2002); 67 Fed. Reg. 70526 (Nov. 22, 2002); 67 Fed. Reg. 67766 (Nov. 6, 2002). All but two of these 25 countries have a majority-Muslim population. *See* Pew Research Ctr., *The Future of the Global Muslim Population*

156–163 (2011), http://www.pewforum.org/2011/01/27/the-future-of-the-global-muslim-population/ (listing North Korea among the nations) (estimating North Korea's Muslim population as less than 0.1 percent of its total population in 2010 and Eritrea's Muslim population at 36.5 percent of its total population in 2010). More than 80,000 males registered in compliance with this program. Am.-Arab Anti-Discrimination Comm., *NSEERS: The Consequences of America's Efforts to Secure Its Borders* 9 (2009), http://www.adc.org/fileadmin/ADC/Pdfs/nseerspaper ("NSEERS White Paper"). Each of those 80,000-plus men were questioned, photographed, and fingerprinted purely on the basis of their nationalities—nationalities apparently chosen because they served as a proxy for Muslim identity.

The NSEERS program did not result in any terrorism-related arrests. *Id.* at 23–24.[2] It did, however, profoundly damage AMEMSSA communities. Many individuals who had registered with NSEERS were placed into immigration removal proceedings based on visa overstays or other irregularities, often where such individuals would not have otherwise been a priority for deportation. *Id.* at 25–26. Indeed, in some neighborhoods, significant portions of the male population were detained or deported. Businesses were shuttered, and many individuals opted to leave the country altogether to avoid being detained or be subjected to an opaque immigration and detention process. Chaleampon Ritthichai, *Special*

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[2] In December 2016, the current presidential administration announced that it would be dismantling the NSEERS program. J. David Goodman & Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. Times (Dec. 22, 2016), http://www.nytimes.com/2016/12/22/nyregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html. In announcing the end of the program, a spokesman for the Department of Homeland Security (DHS) noted that DHS "had ceased use of [NSEERS] more than five years ago" and that "the program was redundant, inefficient, and provided no increase in security." *Id.*

*Registration,* Gotham Gazette (Mar. 24, 2003), http://www.gothamgazette.com/open-government/1763-special-registration.

In addition to the NSEERS registration program, and wholly apart from the arrests and detentions made by the FBI following September 11, the FBI for 15 years has questioned thousands of Muslim and Arab male noncitizens based primarily on their country of origin or religion. The agency first targeted citizens of 15 countries and then expanded that list to include 26 countries. U.S. Gen. Accounting Office, *Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001*, GAO-03-459, 7–8 (2003); *see also* Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 Brook. L. Rev. 41, 47 (2011) [hereinafter Sinnar, *Questioning Law Enforcement*]. These campaigns to question individuals based on their religion or national origin have continued to take place regularly in American Muslim communities across the country. *See* Katie Mettler, *FBI Questioned American Muslims in 8 States Over Weekend About Possible Pre-election Terrorism, Says Civil Rights Group*, Wash. Post (Nov. 7, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/07/fbi-questioned-american-muslims-in-8-states-about-possible-pre-election-terror-says-civil-rights-group/ (describing FBI interviews of American Muslims in eight states prior to the 2016 election in relation to suspicions of terrorism); *see also* Diala Shamas, *Where's the Outrage When the FBI Targets Muslims?*, The Nation (Oct. 31, 2013), https://www.thenation.com/article/wheres-outrage-when-fbi-targets-muslims/ (describing anecdotal evidence of widespread questioning in some communities); Mary Beth Sheridan, *Interviews of Muslims to Broaden*, Wash. Post, July 17, 2004, at A1 (referring to another wave of interviews of American Muslims).

Beyond these registration campaigns and blanket inquiries

directed at American Muslim communities, the FBI has also engaged in suspicionless surveillance of American Muslim communities based on these same crude assumptions. This has included sending informants into religious places without any apparent basis to suspect wrongdoing. In one prominent case, mosque attendees even reported a man's suspicious behavior to the FBI—only to later learn that he was actually an FBI informant tasked with reporting on local Muslims. Jerry Markon, *Tension Grows Between Calif. Muslims, FBI after Informant Infiltrates Mosque,* Wash. Post, (Dec. 5, 2010, 12:47 AM), http://www.washingtonpost.com/wp-dyn/content/article/ 2010/12/04/AR2010120403710.html.

FBI surveillance has also included systematic mapping of AMEMSSA populations. For example, documents obtained through Freedom of Information Act requests show that the FBI collected information on Middle Eastern and Muslim communities in Michigan simply due to the state's large Middle Eastern and Muslim population. Am. Civil Liberties Union, *Unleashed and Unaccountable* 16 (2013), https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf.

The FBI is not the only law enforcement arm that has surveilled AMEMSSA communities wholesale. As revealed by the Associated Press in a series of Pulitzer-Prize-winning reports, the New York City Police Department (NYPD) similarly conducted a secret surveillance program of American Muslim communities in the New York City metropolitan area from at least January 2002 onwards. Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, The Seattle Times (Aug. 25, 2011, 6:16 AM), http://www.seattletimes.com/seattle-news/politics/with-cia-help-nypd-moves-covertly-in-muslim-areas/. Through this long-term program the NYPD monitored Muslim organizations, businesses, students, and individuals in New York and New Jersey. It sent officers into Muslim places of worship, took videos and photos at Muslim-owned locations, and

frequently sought to monitor conversations overheard at mosques. The NYPD did not rely on any modicum of suspicion or wrongdoing for much of this surveillance. Instead, the NYPD targeted 28 "ancestries of interest," all of which were either countries with a large Muslim population or identities such as "American Black Muslim." The NYPD also "mapped" neighborhoods with large immigrant communities, preparing files with titles like "Moroccan Initiative." It further identified Muslim Students' Associations on New York college campuses, sending informants into some of those organizations as well. *See generally* CLEAR, MACLC & AALDEF, *Mapping Muslims: NYPD Spying and its Impact on American Muslims* 39–40 (2013), http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf; *see also Hassan v. City of New York*, 804 F.3d 277, 307 (3d Cir. 2015) (finding that residents of New Jersey subjected to NYPD surveillance stated claims under the First and Fourteenth Amendments); *Raza v. City of New York*, 998 F. Supp. 2d 70, 78–81 (E.D.N.Y. 2013) (discussing the relevance of documents evidencing the existence of the NYPD program to plaintiffs' claims regarding discrimination).

Yet another immigration-related program that has disproportionately impacted AMEMSSA communities is the Controlled Application Review and Resolution Program (CARRP). Instituted by the United States Citizenship and Immigration Services (USCIS) in 2008, the program requires USCIS to screen applications seeking an immigration benefit (i.e. naturalization, lawful permanent resident status, asylum) to ensure that the individual applying does not present a threat to national security. Am. Civil Liberties Union of Southern Cal., *Muslims Need Not Apply: How USCIS Secretary Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans* 15 (2013). The program directs USCIS to place individuals on a "CARPP track" when it first suspects that they present a

"national security concern," subjecting those individuals' applications to further vetting with the aim of "finding a reason to deny [the] application." *Id.*

The American Civil Liberties Union produced an extensive report on CARRP five years after it was instituted, concluding that the program "disproportionately impacted law-abiding immigrants from AMEMS[S]A communities," mislabeling them as "national security concerns," which in turn caused frequent delays and denials of immigration benefit applications. *Id.* at 39. In particular, the report found that because the program directed agents to identify concerns based on indicators such as "national origin" and because of extensive FBI surveillance and data collection on Muslim communities, Muslims were more likely to be treated as "national security concerns" and placed on the CARRP track. *Id.* at 40. As a result of CARRP, individuals who were otherwise eligible for benefits have been subjected to indefinite delays, in one case up to eleven years for a benefit that would normally take six months to receive. *Id.* at 7. This program has ultimately upended lives, as individuals have been forced to postpone the pursuit of economic opportunities, the relocation of their families, and other major life decisions.

At the United States border, AMEMSSA communities are also subjected to additional scrutiny based on national origin. Individuals encountering Customs and Border Patrol (CBP) officers have reported prolonged detention, protracted questioning, and detailed searches of their personal effects that appeared to be related to their Muslim background. Sinnar, *Questioning Law Enforcement*, *supra* at 51–53; *see also id.* at 55 (mentioning instances where travelers with United States citizenship were told they were selected for questioning based on their place of birth). According to recent reports, the FBI and CBP work together to target American Muslims at the border: the FBI provides CBP with a list of countries of origin and other criteria to watch for,

and then approaches passengers at the airport matching those profiles for questioning and recruitment as potential informants. Cora Currier, *Revealed: The FBI's Secret Methods For Recruiting Informants At The Border,* The Intercept (Oct. 5, 2016, 2:52 PM), https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/.

One group of American Muslims described their ordeals at the border in court: despite the fact that they had no criminal records and were not suspected of a crime or terrorism by CBP, they were questioned, fingerprinted, photographed, and detained for four to six hours at the border by CBP officers. *Tabbaa v. Chertoff*, 509 F.3d 89, 94–95 (2d Cir. 2007). Individuals of Muslim or Arab backgrounds have also reported being placed on a "No-Fly List" by the federal government preventing them from traveling overseas by air, despite no notice of whether or why they were placed on such a list. *See Latif v. Holder*, 28 F. Supp. 3d 1134, 1143–46 (D. Or. 2014) (finding that existing procedures for contesting one's placement on the No Fly List were "wholly ineffective" and violated constitutional due process); *see also* Ryan Devereaux, *Class-Action Suit Targets System that Added a Baby to Terrorist Watchlist*, The Intercept (Apr. 6, 2016, 12:25 PM), https://theintercept.com/2016/04/06/class-action-suit-targets-system-that-added-a-baby-to-terrorist-watchlist/ (discussing a similar lawsuit while noting that Dearborn, Michigan—a city with a large Arab American population—had the second highest concentration of individuals on the No Fly List).

This vast national range of policies and practices has demeaned and stigmatized AMEMSSA communities, made them vulnerable to discrimination and afraid that their own government views them with suspicion. *See* Muslim Advocates, *Losing Liberty: The State of Freedom 10 Years after the Patriot Act* 14 (2011), https://www.muslimadvocates.org/ten_years_after_patriot_act_time_to_restore_america_s_freedoms/ ("As a result of [the

FBI's] policies and practices, individuals feel chilled from speaking and worshipping freely because they are afraid that their mosques or other community gatherings and members are under surveillance and that their speech or religious practices may be the basis for government scrutiny."); *see also* Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. Times (Mar. 1, 2009), http://articles.latimes.com/2009/mar/01/local/me-muslim1. These policies and practices have also had a silencing effect *within* AMEMSSA communities. One report observed that as a result of police surveillance programs: individuals became mistrustful of their peers and neighbors; mosques became places of tense watchfulness; and students refrained from expressing their political viewpoints or joining Muslim student groups out of fear of targeting or surveillance. *See* CLEAR, MACLC & AALDEF, *supra* at 5. Public health studies further document the grave personal and emotional consequences of widespread government suspicion. *See, e.g.*, Alyssa E. Rippy & Elana Newman, *Perceived Religious Discrimination and Its Relationship to Anxiety and Paranoia Among Muslim Americans*, 1 J. of Muslim Mental Health 5, 15 (2006) (finding heightened levels of suspicion, vigilance and mistrust among American Muslims, particularly among American Muslim men).

These consequences have only been exacerbated by the increasing incidence of private discrimination against these communities—discrimination reinforced when federal and state officials act with impunity in adopting measures that particularly burden AMEMSSA communities.

## II. Government Scrutiny of AMEMSSA Communities Has Contributed to Private Discrimination.

There is often a "mutually reinforcing relationship between individual hate crimes [or prejudice] and governmental racial profiling." Ahmad, *supra* at 1262; *see also* David A. Strauss,

*Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935, 945 (1989) (noting that government "measures that brand a group as inferior or place it in an inferior position certainly encourage [private] prejudice"). And so it is here: by targeting AMEMSSA communities based on generalized stereotypes, and by engaging in the conduct alleged by respondents, federal and local government action has given a similar imprimatur to private biases against these communities.

When government officials rely on stereotypes as proxies for suspicion, it signals to the population at large that such stereotypes are appropriate and permissible. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (noting that government action criminalizing homosexual conduct was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"). The statements made by, and policies espoused by, prominent political leaders have a particular effect on public opinion; indeed, an analysis of public opinion data by the executive director of the Gallup Center for Muslim Studies concluded that levels of anti-Muslim sentiment in the United States correlated more strongly with domestic political discourse than with external events, even acts of terrorism. *See* Dalia Mogahed, *Islamophobia is Made Up*, Islamic Monthly (Sept. 25, 2013, 9:14 AM), http://theislamicmonthly.com/islamophobia-is-made-up/.

And that anti-Muslim sentiment has been rising substantially since September 11. The public at large frequently perceives American Muslims as having links to terrorism and various segments of the public support restricting American Muslims' rights as a result. In December 2004, a national poll indicated that fully 44 percent of Americans supported some curtailment of civil liberties for American Muslims, 27 percent believed that American Muslims should be required to register their location, and 39 percent believed that American Muslims should be required to carry special identifica-

tion. Blaine Friedlander, *Fear Factor: 44 percent of Americans Queried in Cornell National Poll Favor Curtailing Some Liberties for Muslim Americans*, Cornell Chron. (Dec. 17, 2004), http://news.cornell.edu/print/13782. A TIME magazine poll conducted in 2010 found that nearly one-third of Americans believed that Muslims should be barred from running for the office of President. Alex Altman, *TIME Poll: Majority Oppose Mosque, Many Distrust Muslims*, TIME (Aug. 19, 2010), http://content.time.com/time/nation/article/0,8599,2011799,00.html. One poll found that these views were polarized along the political spectrum and that at least 38 percent of poll respondents had an unfavorable view of Muslims generally. Anna Newby & Elizabeth McElvein, *Poll Shows American Views on Muslims and the Middle East Are Deeply Polarized*, Brookings Institution (July 27, 2016), https://www.brookings.edu/blog/markaz/2016/07/27/poll-shows-american-views-on-muslims-and-the-middle-east-are-deeply-polarized/.

It should go without saying—but apparently must be said—that these widespread notions are utterly misguided. American Muslims are just as likely as other United States faith groups to reject violence. Inst. for Soc. Policy and Understanding, *American Muslim Poll: Participation, Priorities, and Facing Prejudice in the 2016 Elections* 10 (2016), http://www.ispu.org/wp-content/uploads/2016/08/poll2016-1.pdf; *see also* Nicole Naurath, *Most Muslim Americans See No Justification for Violence*, Gallup (Aug. 2, 2011), http://www.gallup.com/poll/148763/muslim-americans-no-justification-violence.aspx ("At least 7 in 10 American adults from all major religious groups agree that [attacks on civilians by individuals or small groups] are never justified, American Muslims are most opposed, with 89% rejecting such attacks"); *see also* Pew Research Ctr., *Little Support for Terrorism Among Muslim Americans*, (2009),

http://www.pewforum.org/2009/12/17/little-support-for-terrorism-among-muslim-americans/. Relatedly, and unsurprisingly, there is a significant gap between how the American public views Muslims, and how American Muslims view themselves. Pew Research Ctr, *Muslim Americans: No Sign of Growth in Alienation or Support for Extremism*, (2011), http://www.people-press.org/2011/08/30/ muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/ ("[W]hile about a quarter of the public (24%) thinks that Muslim support for extremism is increasing, just 4% of Muslims agree.").

These widespread negative perceptions of Muslims have concrete adverse consequences, up to and including violence against members of AMEMSSA communities. In the years immediately following September 11, these communities were subject to a "steady stream of violence." Ahmad, *supra* at 1263.[3] Yet evidence shows that acts of bias, hate violence, and discrimination towards AMEMSSA communities continue to increase and are reaching new, even more disconcerting levels.

At least 50 percent of American Muslim students who took part in a 2012 survey reported experiencing some form of bullying because of their religion. Council on Am.-Islamic Rel. – Cal., *Growing in Faith: California Muslim Youth Experiences with Bullying, Harassment & Religious Accommodation in Schools* 2–3 (2012), http://ca.cair.com/downloads/GrowingInFaith.pdf. Islam-

[3] To illustrate how AMEMSSA communities are frequently conflated, there were numerous reports of violence directed against Hindus, Sikhs and other South Asian individuals following September 11—often with the victims being mistaken as Muslims or Arabs by the perpetrators of these hate crimes. *Id.* at 1262, 1292. Not much has changed since then; many Sikhs still are the target of anti-Muslim hate crimes. *See* Moni Basu, *15 Years After 9/11, Sikhs Still Victims of Anti-Muslim Hate Crimes*, CNN (Sept. 15, 2016, 11:22 AM), http://www.cnn.com/2016/09/15/us/sikh-hate-crime-victims/.

ophobia has also pervaded the workplace; Muslims accounted for one-quarter of the 3,386 religious discrimination claims filed with the EEOC in 2009, despite accounting for less than two percent of the United States population. Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. Times, Sept. 23, 2010, at B1. This discrimination has not spared even the most privileged segments of these communities: in a survey of hundreds of Muslim physicians, fourteen percent report experiencing discrimination, including having patients refuse to be treated by them. Lena H. Sun, *American Muslim Doctors Feel Greater Scrutiny, Even Patients' Suspicions,* Wash. Post (Dec. 11, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/12/11/american-muslim-doctors-feel-greater-scrutiny-even-patients-suspicions/?utm_term=.f294a2de2ae9.

More troubling still, an analysis of hate crimes statistics reported by the FBI showed that there were 91 reported aggravated or simple assaults motivated by anti-Muslim bias in 2015— only two shy of the highest reported number of 93 in 2001. Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, Pew Research Ctr. (Nov. 21, 2016), http://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/. In the period leading up to, and following, the 2016 election, acts of violence motivated by animus towards Muslims also spiked. A study examining Islamophobia since the start of the election cycle found that there were more than 53 anti-Muslim attacks in December 2015 alone. Engy Abdelkader, *When Islamophobia Turns Violent: The 2016 U.S. Presidential Elections* 4 (2016), http://bridge.georgetown.edu/wp-content/uploads/2016/05/When-Islamophobia-Turns-Violent.pdf. There were also at least 50 reports of anti-Muslim harassment or intimidation in the week following Election Day. Southern Poverty L. Ctr., *Update: Incidents of Hateful Harassment Since Election Day Now Number 701*,

(Nov. 18, 2016), https://www.splcenter.org/hatewatch/2016/11/18/update-incidents-hateful-harassment-election-day-now-number-701.

The numbers do not fully capture the fear and pain that this intensifying pattern of bias generates for AMEMSSA communities as a whole. Individual incidents of harassment and violence highlight how traumatic these events can be. In August 2012, a gunman entered a Sikh temple outside of Milwaukee, Wisconsin and opened fire on observers at morning prayers, killing six worshippers. *See* Steven Yaccino et al., *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, N.Y. Times, Aug. 5, 2012, at A1 (suspecting that the attack was motivated by Anti-Muslim sentiment and noting that Sikhs are frequently and mistakenly targeted in instances of anti-Muslim violence). In July 2016, a number of attacks against Muslim worshippers outside of mosques occurred across the country, with one man being shot while on his way to prayers in Houston, Texas. *Attacks Underscore Fears that Anti-Muslim Violence on the Rise*, CBS News (July 3, 2016, 9:42 PM), http://www.cbsnews.com/news/houston-florida-mosques-worshipers-shooting-beating/. In September 2016, a mosque in Florida was set on fire by an arsonist who had previously criticized Islam on social media. Eric Lichtblau, *Hate Crimes against American Muslims Most Since Post-9/11 Era*, N.Y. Times, Sept. 17, 2016, at A13. That same month in Brooklyn, New York, an individual attacked two Muslim women and their children, harassing the women and attempting to rip off their hijabs. Lauren del Valle, *2 Muslim Women, Babies Attacked in Alleged Hate Crime in New York*, CNN (Sept. 10, 2016, 12:49 AM), http://www.cnn.com/2016/09/10/us/brooklyn-muslim-women-attacked/index.html. More recently, in November 2016, multiple mosques received letters threatening genocide against Muslims, expressing hope that Muslims would experience "what Hitler did to the Jews." Kristine Guerra, *'It's A Sickness': Letters Calling for Genocide of Muslims*

*Sent To Mosques Across The Country*, Wash. Post (Nov. 29, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/27/trump-will-do-to-you-muslims-what-hitler-did-to-the-jews-mosques-get-threatening-letters/?utm_term=.1ba6b503ecdc.

This rising tide of hate crimes and hate speech directed at AMEMSSA communities is alarming to say the least. Yet, it is, in part, a byproduct of the national security and immigration policies of federal and local authorities, which have normalized and legitimized the profiling and stereotyping of AMEMSSA communities. Without a check on such official action, the public targeting of AMEMSSA communities may continue to feed into existing biases and private discrimination against these groups.

## III. In the Absence of Protection from the Political Branches, Judicial Relief from Government Actions Based on Stereotyping Is Important to Forestall Additional Discrimination.

This case presents a prime example of why there is a *Bivens* remedy for government action that targets individuals based on their race, religion, ethnicity, or national origin. In our system of laws, judicial review serves as a check on rogue executive power. The need for judicial review is all the more pressing here, given respondents' well-pled allegations of executive overreach and the systemic public and private discrimination currently facing AMEMSSA communities. Providing a judicial forum for respondents' claims would comport with the long-standing view that the judicial branch plays an important role in protecting "discrete and insular minorities" from prejudice where the other branches of government and the political process have failed to do so. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The Court has recognized that judicial action is imperative where official action would otherwise further stigmatization of minorities and legitimize private discrimi-

nation. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."). The Court has likewise made clear that it must intervene when state action is based on archaic or overbroad generalizations about group characteristics, lest the Court perpetuate a "self-fulfilling prophecy" that could be further "used to deny rights or opportunities" to that group. *See United States v. Virginia*, 518 U.S. 515, 542–543 (1996).

Petitioners contend that respondents are not entitled to pursue a *Bivens* remedy because the complained-of conduct—described in extensive, well-pled allegations of discriminatory action—occurred in a national security context. But this Court frequently has stepped in to check executive overreach even where executive officials claim that their actions serve national security interests. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Indeed, the *Hamdi* plurality—in a prescient passage—noted that "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States * * * history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 542 U.S. at 530. Quite so.

Respondents, like most of the hundreds of men and women arrested in the wake of September 11, did not and do not represent national security concerns. They were detained because of generalized, invidious stereotypes linking their appearance to terrorism. This Court has repeatedly invalidated government action rooted in such blatant stereotyping. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("[W]here the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will

prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates.") (citation omitted); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns.").

The only time in the last century that this Court has *upheld* government action rooted in such widespread stereotyping was when it affirmed the race-based internment of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* was not this Court's finest hour; indeed, the decision has been roundly condemned both for endorsing group-based judgments of disloyalty and for deferring categorically to the political branches. *See* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 391–394 (2011) (noting that four sitting Justices disavowed *Korematsu* as precedential authority in their confirmation hearings). Petitioners would be hard-pressed to show why their asserted national security defense to the classification of individuals based on religion and national origin should be accepted any more than the government's justifications for such conduct 70 years ago.

For institutional reasons, the branch of government charged with protecting national security, the executive branch, is not well-positioned to unilaterally decide questions of law that appear to pit liberty or equality against security interests. *See Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, concurring in the judgment, and dissenting in part) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular

responsibility is to maintain security."). The importance of the judicial role in defining the outer limits of executive conduct could be no more apparent than it is today. The executive's reluctance to curb the widespread stereotyping resulting in respondents' detention and abuse is—to put it mildly—not likely to change in the immediate future. *See* Press Release, Donald J. Trump, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration ("Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.").

To be sure, the executive branch contains internal accountability mechanisms, including offices of general counsel, Inspectors General, and civil liberties offices. *See, e.g.*, Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 B.Y.U. L. Rev. 357, 364–367 (2010); *see also* Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 Harv. C.R.-C.L. L. Rev. 289, 294–298 (2015). But those mechanisms are ultimately beholden to the executive. Presidents may remove Inspectors General without cause, for instance, and national security agencies are statutorily authorized to block Inspector General investigations where they deem the disclosure of information a serious threat to national security. *See* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 Stan. L. Rev. 1027, 1034–35 (2013) [hereinafter Sinnar, *Protecting Rights*].

Those internal moderating forces also can be manipulated or obstructed, especially with respect to national security. In one noteworthy recent example, the executive branch "used national security secrecy to prevent multiple accountability mechanisms from scrutinizing its warrantless surveillance program," which was later found to have exceeded the

bounds of what information the government could lawfully collect under the Foreign Intelligence Surveillance Act (FISA). Clark, *supra* at 404. More recently still, the Justice Department imposed unprecedented new limits on its Inspector General's ability to access information, impeding investigations into the FBI's counterterrorism powers and threatening to defang Inspectors General across the federal government. *See* Eric Lichtblau, *Tighter Lid on Records Threatens to Weaken Government Watchdogs*, N.Y. Times, Nov. 28, 2015, at A1.

Furthermore, even if internal accountability mechanisms could be rigorous in investigating misconduct, they may not be disposed to recommend the kinds of remedies that courts provide—and in any case, they typically lack the remedial powers to enforce their findings. Sinnar, *Protecting Rights*, *supra* at 1077. This case provides a potent example. The Office of the Inspector General of the United States Department of Justice prepared two rigorous reports—reports that supply the substance of many of the allegations in this case—highlighting the flawed manner in which respondents and others were arrested and detained following September 11. But these reports did not result in accountability for high-level officials, nor in redress from executive agencies or Congress for the individual victims of the government's misconduct. *See id.* at 1043 (observing that the Justice Department "vigorously defended its actions" after the reports were issued and that the Attorney General "asked Congress for an expansion of law enforcement powers just two days after the reports' release"); *id.* at 1067–69.

Nor, for several reasons, is Congress likely to serve as an adequate check on policies affecting AMEMSSA communities.

First, the victims of executive overreach in such instances can often be non-citizens. *See, e.g.*, Br. In Opp. 9–11 (noting respondents were all held in detention based on immigration

charges); *see also* NSEERS White Paper, *supra* at 9 (noting that the NSEERS program required the registration of non-citizens). Such groups are not constituents and cannot vote; Congress consequently has fewer incentives to step in and address their concerns. Second, Congress may be reluctant to protect even citizen-constituents from AMEMSSA communities in light of current public opinion; indeed, as recently as June 14, 2016, fully half of the responders to a Reuters poll agreed with a temporary ban on Muslims from entering the United States. *Agree/Disagree: The United States Should Temporarily Stop All Muslims From Entering the United States*, Reuters, http://polling.reuters.com/#poll/TM923Y16_4/filters/LIKELY:1/dates/20160501-20160614/type/smallest (last accessed Dec. 8, 2016). In light of such widespread public hostility to these communities, there is every good reason to question whether majoritarian institutions will adequately protect the rights of individuals within these groups.

Third, democratic processes are generally less likely to protect minorities when it comes to matters like national security policies, which are frequently adopted in the wake of terrorist incidents or other crises that occasion widespread fear. Legislators in such circumstances "may be more skeptical about pro-liberty than pro-security proposals," particularly where "[e]rror costs on the liberty margin involve harms to discrete, potentially scattered individuals." Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 Cal. L. Rev. 887, 921 (2012). In fact, recent history bears out that Congress has been willing to leave "large discretion in executive hands"; consider, for example, the military commissions used to try suspected terrorists, and the 2008 amendments to FISA. *Id.* at 923.

Neither Congress nor the executive has shown itself to be capable of curbing, or willing to redress, the harms of which respondents complain. The judiciary can, and should.

***

AMEMSSA communities have been subject for many years now to disproportionate scrutiny by their government and unjustified animus in daily life—animus that appears to grow by the day, and which is regrettably endorsed at the highest levels. *See* Maggie Haberman & Richard Perez-Pena, *Muslim List? Call by Trump Draws Outrage*, N.Y. Times, Nov. 21, 2015, at A1 (discussing comments proposing a mandatory registry of Muslims in the United States). With such profoundly troubling proposals, and a rising tide of private discrimination and hate violence throughout the country, it is no wonder that AMEMSSA communities are living in fear for their safety and their livelihoods. A remedy for respondents' allegations of intentional discrimination by government officials would provide AMEMSSA communities with some long-awaited solace that their nation's courts will protect their rights, even if the other branches of government fail to do so.

## CONCLUSION

For the foregoing reasons and those in the petition, the ruling of the Second Circuit should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

**(Caption continued on inside cover)**

**On Writs of Certiorari to the U.S. Court of Appeals for the Second Circuit**

## BRIEF OF FORMER U.S. ATTORNEYS GENERAL WILLIAM P. BARR, ALBERTO R. GONZALES, EDWIN MEESE III, and DICK THORNBURGH; AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: November 25, 2016

**No. 15-1359**

JOHN D. ASHCROFT, former U.S. Attorney General, and ROBERT MUELLER, former Director of the FBI,
*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

**No. 15-1363**

DENNIS HASTY and JAMES SHERMAN,
*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

## QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General, former Director of the Federal Bureau of Investigation (FBI), and other senior federal government officials personally liable for policy decisions made about national security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether those senior officials are entitled to qualified immunity for their alleged role in the treatment of Respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether Respondents' allegations that those senior officials personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanations–that the actions of the senior Justice Department officials were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States, and that the actions of the heads of the Metropolitan Detention Center were motivated by a desire to comply with the FBI's terrorism designations.

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## INTERESTS OF *AMICI CURIAE*

The *amici curiae* are four former Attorneys General and a public- interest law firm.[1] *Amici* believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. *Amici* are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims. *Amici* also worry that the decision below inappropriately expands judicially inferred damages remedies against federal officials for alleged violations of constitutional rights, and it adopts a standard for what constitutes a "plausible" claim for relief that is far broader than the one established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Alberto R. Gonzales served as Attorney General of the United States from 2005 to 2007. He also served as White House Counsel to

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

President George W. Bush from 2001 to 2005 and as a Justice on the Texas Supreme Court from 1999 to 2001.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center. It regularly appears in this and other federal courts to support appropriate enforcement of pleading standards in civil litigation.

*Amici* also filed an *amicus curiae* brief in support of the three certiorari petitions filed by Petitioners. Several of the former senior Justice Department officials who signed the earlier *amicus curiae* brief could not be contacted during Thanksgiving week to ascertain whether they wished to join this brief as well.

## STATEMENT OF THE CASE

Petitioners in Nos. 15-1358 and 15-1359 are high-ranking federal officials who played a prominent role in directing the Government's investigation into the events of September 11, 2001, when al Qaeda's murderous and unprovoked attack on American

civilians caused nearly 3,000 deaths. Respondents are six aliens who were arrested for immigration violations and were detained in connection with that investigation, under highly restrictive conditions at the Metropolitan Detention Center (MDC) in Brooklyn.[2] They contend that the conditions of their detention violated their Fifth Amendment rights to substantive due process and equal protection of the laws.

Respondents allege that U.S. Attorney General John Ashcroft and FBI Director Robert Mueller, Petitioners in No. 15-1359, actively supervised the 9/11 investigation. They allege that Ashcroft and Mueller developed a policy whereby the federal government would arrest any Arab or Muslim man who, while being questioned in connection with the investigation, was determined to be in the country in violation of immigration laws. Pet. App. 245a.[3] They further allege that Petitioners established a "hold-until-cleared" policy, whereby aliens being detained because they were deemed "of interest" or "of high interest" to the investigation were not to be released until the FBI affirmatively cleared them of terrorist ties. *Id.* at 245a-246a. Ultimately, the Immigration and Naturalization Service (INS) placed 762 detainees on its Custody List

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[2] In using the term "Respondents," *amici* refer only to those six men. Several other plaintiffs/respondents were not detained at the MDC. The Second Circuit dismissed their claims, and they have not petitioned the Court for review of that dismissal. Petitioners in No. 15-1363 are the former Warden and Associate Warden at the MDC, Dennis Hasty and James Sherman.

[3] "Pet. App." refers to the Petition Appendix filed in No. 15-1363.

(the "INS List"); those individuals were thereby made subject to the hold-until-cleared policy. *Id.* at 9a. James W. Ziglar, Petitioner in No. 15-1358, served as Commissioner of INS from 2001 to 2002.

Bureau of Prisons (BOP) policy required that those classified as "of interest" or "of high interest" were to be confined "in the most restrictive and secure conditions permitted by BOP policy." *Id.* at 49a. At the MDC, that meant detention in the facility's Administrative Maximum Special Housing Unit ("ADMAX SHU"), a unit in which the conditions of confinement were quite harsh. Respondents do not contend that the confinement policies adopted for the ADMAX SHU and applied to Respondents violated BOP policy. Respondents each were confined in ADMAX SHU for several months before being cleared of involvement in terrorism and deported. Respondents were among 84 unauthorized aliens housed in ADMAX SHU during 2001-02. The great majority of individuals detained due to their "of interest" or "of high interest" status were detained at non-federal facilities (such as the Passaic County Jail), where their conditions of confinement were far less harsh.

The Fourth Amended Complaint alleges that Petitioners violated Respondents' substantive due process rights by subjecting them to punitive conditions of confinement that allegedly served no valid governmental purpose. Although acknowledging that those conditions might have served a valid purpose if Petitioners had had reason to believe that the detainees were terrorists, Respondents allege that all Petitioners were aware that, for many of the aliens

designated "of interest" or "of high interest," the government lacked any evidence plausibly connecting them to terrorism. Petitioners are alleged to have violated Respondents' equal protection rights by singling them out for harsh treatment based on their race, religion, and/or ethnic or national origin. *Id.* at 335a.

The district court granted motions to dismiss filed by Ashcroft, Mueller, and Ziglar (the "DOJ Petitioners"). The court concluded that the complaint did not plausibly allege punitive intent, Pet. App. 189a, nor did it plausibly allege that they "directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a. The court largely denied motions to dismiss filed by the MDC-based defendants, including Petitioners Hasty and Sherman. *Id.* at 190a-194a, 200a-202a, 219a-220a; 224a-225a. They filed an interlocutory appeal from the denial of their assertion of qualified immunity. Respondents appealed dismissal of claims against the DOJ Petitioners.

A divided Second Circuit reinstated the substantive due process and equal protection claims against the DOJ Petitioners and largely affirmed denial of the MDC Petitioners' motion to dismiss. Pet. App. 1a-156a. The appeals court first concluded that a *Bivens* remedy was available for each of Respondents' Fifth Amendment claims. *Id.* at 21a-29a. It held that Respondents' status as unauthorized aliens and the national security context of their detention was irrelevant to the *Bivens* analysis.

The appeals court also rejected Petitioners'

assertion of qualified immunity. *Id.* at 46a-47a, 55a-57a, 71a-72a, 80a-81a. The court concluded that federal case law as of 2001 clearly established that Petitioners' alleged conduct violated Respondents' constitutional rights.

The appeals court also concluded that the complaint adequately stated claims against all Petitioners. The Court recognized that the DOJ Petitioners did not create the allegedly punitive confinement conditions in question. *Id.* at 30a. It nonetheless held that they could be charged with responsibility for those conditions, because the complaint alleged that: (1) they were aware that the New York office of the FBI had designated many Arab/Muslim detainees as "of interest" or "of high interest" despite lacking any credible evidence of their ties to terrorism; and (2) they approved merging the New York FBI's list of detainees (the "New York List") with the INS List, thereby ensuring application of the hold-until-cleared policy to Arab/Muslim detainees whom they knew could not plausibly be tied to terrorism. Pet. App. 30a-46a, 59a-65a.

The MDC Petitioners similarly asserted that the complaint failed to state a claim against them for constitutional violations, arguing that the most plausible inference to be drawn from the complaint's allegations is that they placed the six Respondents in the ADMAX SHU not for punitive or discriminatory purposes (as alleged by Respondents) but because BOP policy required them to do so. The Second Circuit rejected that assertion, noting that the complaint alleged that the MDC Petitioners eventually learned that the FBI was designating Arab/Muslim men as "of

interest" and "of high interest" without any evidence of ties to terrorism. *Id.* at 48a-52a. The court concluded that the complaint adequately alleged claims against the MDC Petitioners by alleging that they continued to abide by the FBI's detainee classifications even after learning that those classifications lacked evidentiary support. *Ibid.*

Judge Raggi dissented. Pet. App. 83a-156a. She asserted that the courts should not recognize the claimed *Bivens* remedies against federal officials, when the claimed remedies challenge official "national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country." *Id.* at 84a. Under those circumstances, she concluded, "Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages." *Ibid.*

She also concluded that Petitioners were entitled to qualified immunity. *Id.* at 84a-85a. She explained:

> The law did not [in 2001-02] clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not

> sure that conclusion is clearly established even today.

*Id.* at 85a.

Judge Raggi also concluded that the complaint failed to adequately allege discriminatory treatment, stating that the complaint failed to allege facts from which one could reasonably infer that Petitioners acted "because of, not merely in spite of, the action's adverse effects" on Arabs/Muslims. *Id.* at 130a (quoting *Iqbal*, 556 U.S. at 681); *see also id.* at 142a-144a. She asserted, for example, that the complaint provides no factual basis for inferring that anyone decided to merge the New York List with the INS List "*because* it would keep [Respondents] in restrictive confinement." *Ibid.* Nor could the actions of the MDC Petitioners "plausibly imply discriminatory intent because they are obviously and most likely explained by reliance on the FBI's designations of each [Respondent] as a person 'of high interest,' or 'of interest,' to the ongoing terrorist investigation." *Id.* at 151a.

An equally divided Second Circuit denied rehearing *en banc*. Pet. App. 227a-240a. Judge Jacobs issued an opinion dissenting from the denial, joined by Judges Cabranes, Raggi, Hall, Livingston, and Droney. *Id.* at 231a-240a.

## SUMMARY OF ARGUMENT

*Amici* agree that the Second Circuit's judgment should be reversed based on each of the three grounds urged by Petitioners. We write separately to focus particular emphasis on the qualified immunity

question. Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below—by directing the district court to proceed with discovery in a case that is already *14 years old*—calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct.

In the absence of early dismissal, current and former government officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* are concerned by the disruptive effects of such discovery, and they are very concerned that such disruptions are likely to impair the ability of high-level officials to carry out their missions effectively. Such disruptions are impermissible under the terms of the qualified immunity doctrine and the pleading standards established by the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.

Respondents raise constitutional claims that are largely the same as those at issue in *Iqbal* and that arise from precisely the same underlying facts: the

detention of Arab/Muslim unauthorized aliens at the MDC under harsh conditions in 2001-02. *Iqbal* determined that the complaint at issue there did not adequately state a constitutional claim against Ashcroft and Mueller for their alleged role in the detentions. The Second Circuit decision, by reaching the opposite conclusion in connection with a complaint that added little in the way of new factual allegations, conflicts with *Iqbal*. The considerations that led the Court to overturn the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should also persuade the Court to overturn the appeals court's similar assessment in this case. In particular, Respondents' complaint includes no factual allegations from which one can reasonably infer that Ashcroft, Mueller, and Ziglar played any role in determining the conditions of Respondents' confinement.

Similarly unwarranted is the Second Circuit's recognition of a judicially inferred damages remedy against senior Executive Branch officials for alleged infringement of Respondents' constitutional rights in the course of carrying out their national security responsibilities. The Second Circuit's unprecedented recognition of *Bivens* actions to challenge Executive Branch national security policy conflicts with decisions of this Court. The Court has cautioned against recognition of new *Bivens* remedies when, as here, "special factors" counsel hesitation. Those special factors include the national security and immigration-law aspects of this case (areas in which courts traditionally defer to the judgments of the elected branches), the availability of alternative remedies (*e.g.*, *habeas corpus* proceedings), the fact that the suit directly challenges policymaking decisions of the

Executive Branch, and the failure of Congress to provide an express damages remedy despite its considerable focus on detention-related issues arising in the course of the 9/11 investigation.

## ARGUMENT

### I. THE SECOND CIRCUIT'S QUALIFIED IMMUNITY RULING THREATENS THE ABILITY OF FEDERAL OFFICIALS TO AVOID THE BURDENS OF LITIGATION IMPOSED BY INSUBSTANTIAL CLAIMS

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

*Harlow v. Fitzgerald*, 457 U.S. 800, 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety.

*Mitchell*, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

Events proved Justice Stevens's prescience. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding

national security matters proliferated throughout the administrations of Presidents Barack Obama, George W. Bush, and Bill Clinton. *See, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (suit against Defense Secretaries Leon Panetta and Donald Rumsfeld alleging mistreatment of military detainee); *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011) (suit against Attorney General alleging improper authorization of material-witness warrants to detain terrorism suspects); *Gonzalez v. Reno*, 325 F.2d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez).

### A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

The Court has adopted several measures designed to reduce the burdens imposed on government officials when they are required to respond to claims seeking an award of damages. In particular, the Court has crafted a qualified immunity doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Mitchell*, 472 U.S. at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "insubstantial claims [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Because Respondents cannot in any event satisfy the second of the two *Saucier* requirements—a showing that the constitutional rights they assert were "clearly established"—Petitioners are entitled to dismissal on the basis of qualified immunity.

### B. Pre-2001 Case Law Did Not Clearly Establish that the Harsh Conditions Allegedly Imposed by Petitioners Violated Respondents' Due-Process Rights

The Second Circuit pointed to no pre-2001 decision whose holding directly supported its conclusion: that substantive due process prohibited federal officials from confining lawfully arrested unauthorized aliens in harsh conditions while

investigating their possible involvement in terrorism.[4] Instead, it merely cited *Bell v. Wolfish*, 441 U.S. 520 (1979), for the more general proposition that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a.

But that citation does not begin to answer the qualified-immunity question raised by this case: did court decisions published by 2001 clearly establish that the harsh conditions of confinement at issue here are not reasonably related to a "legitimate governmental objective?" In 2001-02, federal officials concluded that imposing harsh conditions could assist the federal government in responding to a national-security crisis, by preventing detainees from communicating with the outside world, reducing the potential for violence, and increasing the likelihood that detainees might assist with ongoing terrorism investigations. In the absence of pre-2001 case law arising in similar factual settings and rejecting that conclusion, Petitioners are entitled to good-faith immunity from damages claims challenging the conclusion.

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[4] The Second Circuit did not contest that the harsh conditions adopted at the MDC could, in appropriate circumstances, be imposed on convicted felons. Indeed, it expressly acknowledged that imposing those conditions on "individuals with suspected ties to terrorism" could be justified based on "national security grounds." Pet. App. 45a. Nor did the court contest that federal immigration officials were entitled to detain Respondents and other unauthorized aliens under generally applicable prison conditions.

The Second Circuit's contrary holding sharply conflicts with this Court's qualified immunity case law. The Court has repeatedly explained that "[a] clearly established right is one that is sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right. ... Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (emphasis added). Perhaps the best evidence that the substantive due process right asserted by Respondents was not "clearly established" is the Second Circuit's 6-6 vote denying rehearing *en banc* in this case. That half the judges on the Second Circuit concluded that Petitioners' alleged conduct did not violate the Due Process Clause is convincing evidence that the contrary view was not "clearly established." The fact that the former senior Justice Department officials who filed this brief find the alleged conduct constitutionally unobjectionable is further evidence that the Second Circuit's view was not clearly established in 2001.

The Second Circuit erred by examining the due process issue at too high a level of generality. This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality. ... The general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Al-Kidd*, 563 U.S. at 742. Similarly, the Second Circuit's general proposition—that the Due Process Clause prohibits imposing on pre-trial detainees punishment that is not reasonably related to a legitimate government objective—is of little help in

determining whether it was "clearly established" that the harsh conditions of confinement at issue here are not reasonably related to any legitimate objective.

> As the D.C. Circuit has pointed out:
>
> > It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

*Int'l Action Ctr. v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). Federal officials in 2001, based on then-existing case law, could not reasonably have anticipated that their decision to impose harsh conditions of confinement on unauthorized aliens (as a means of securing information about terrorist activity, preventing detainees from communicating with the outside world, and reducing the potential for violence) would give rise to liability for damages.

The Second Circuit's reliance on *Bell v. Wolfish* to support its no-qualified-immunity finding was misplaced. The plaintiffs in *Wolfish* were individuals being held in a federal detention facility as they awaited trial; they contended that the conditions of their confinement were overly harsh and thus violated their substantive due process rights. The Second Circuit agreed and enjoined more than 20 of the

facility's practices on constitutional grounds. In his opinion for the Court that reversed the Second Circuit, Justice Rehnquist stated that harsh conditions of confinement do not amount to proscribed "punishment" so long as those conditions are not "arbitrary and purposeless"; that is, they are "reasonably related to a legitimate governmental objective." *Wolfish*, 441 U.S. at 538-39.[5] Accordingly, *Wolfish* cannot plausibly be deemed to have provided government officials with clear guidance regarding constitutionally impermissible detention practices because each of the practices challenged in that case was *upheld*.

Thus, while *Wolfish* established at a high level of generality that at some point conditions of confinement can become so extreme that they cross the line into proscribed punishment, the decision cannot legitimately be relied on by Respondents as a basis for denying qualified immunity to Petitioners. The only other decision relied on by the Second Circuit as grounds for denying qualified immunity to the DOJ Petitioners was *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd on other grounds sub nom., Ashcroft v. Iqbal* , 556 U.S. 662 (2009). Even if this Court were to accept the continued validity of *Iqbal v. Hasty*, that decision provides no support for the Second Circuit's qualified-immunity ruling because it was handed down more than five years *after* Respondents were released from custody. Government officials are entitled to

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[5] The Court concluded, for example, that the facility's "double bunking" practice (housing two inmates in cells designed for only one) did not violate due process rights because the practice was adopted to accommodate increases in the inmate population, not to punish inmates. *Id.* at 541-42.

qualified immunity unless they have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Second Circuit's 2007 pronouncements regarding due-process limits on conditions of confinement would, of course, have been unknown to a "reasonable person" in 2001-02.

### C. Under the Second Circuit's Ruling, Virtually Every Alleged Violation Would Be Deemed "Clearly Established"

Qualified immunity provides government officials with "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell*, 472 U.S. at 526 (emphasis added). Yet, if the Second Circuit's formulation of qualified immunity is upheld, that essential purpose of the doctrine will be rendered a nullity: motions to dismiss on the pleadings will be denied whenever a detainee complaining about the conditions of his confinement asserts that the restrictions imposed on him are not reasonably related to a legitimate governmental objective.

Respondents allege that the harsh conditions imposed on them could not possibly have served any legitimate governmental objective, but they have pointed to no case law clearly establishing that proposition. While the Fourth Amended Complaint (FAC) asserted that Petitioners intended that their policies would arbitrarily "sweep up many individuals ... with no reason to suspect them of terrorism," Opp. Cert. Br. at 5, it included no specific factual allegations to support that bare assertion.

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Respondents allege that the harsh conditions imposed on them could not possibly have served any legitimate governmental objective, but they have pointed to no case law clearly establishing that proposition. While the Fourth Amended Complaint (FAC) asserted that Petitioners intended that their policies would arbitrarily "sweep up many individuals ... with no reason to suspect them of terrorism," Opp. Cert. Br. at 5, it included no specific factual allegations to support that bare assertion.

The FAC incorporates by reference the findings of a 2003 report prepared by the Justice Department's Office of Inspector General ("OIG Report").[6] The OIG Report concluded that the DOJ Petitioners did not direct anyone to engage in the mass incarceration of aliens from the Middle East determined to be in the United States in violation of immigration laws. Rather, the FBI instructed its agents that "if during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the ... attacks." OIG Report at 13, Joint Appendix (J.A.) 61. The INS instructed its agents to "exercise sound judgment" and to detain only those unauthorized aliens in whom the FBI had "an interest." *Id.* at 44, J.A. 108. Although Respondents allege that the FBI designated some unauthorized aliens (including themselves) as "of interest" or "of high interest" in the 9/11 investigation despite the absence of individualized evidence tying them to terrorism, Respondents do not allege that those designations were the product of any actions by either the DOJ Petitioners or the MDC Petitioners. Indeed, it is uncontested that many unauthorized aliens questioned by the FBI in connection with the 9/11 investigation were *not* designated "of interest" or "of high interest," and thus were subjected to neither the hold-until-cleared policy nor the harsh conditions of confinement imposed on unauthorized aliens held in the MDC's ADMAX SHU.

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[6] *See* Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003).

The Second Circuit nonetheless concluded that Petitioners were not entitled to qualified immunity, Pet. App. 46a-47a, 55a-57a, thereby subjecting them to the burdens of litigation from which the qualified-immunity doctrine is intended to protect government officials. It did so based on nothing more than naked allegations that the restrictions imposed on Respondents were not reasonably related to a legitimate governmental objective. Any detainee can make an identical allegation with respect to the fact-specific conditions of confinement imposed on him.[7] If the Second Circuit's qualified-immunity standard is upheld, it is difficult to envision any such lawsuit being dismissed at the pleadings stage based on a qualified-immunity defense.

## II. RESPONDENTS' COMPLAINT DOES NOT SATISFY THE PLEADING STANDARDS ARTICULATED BY *IQBAL* AND *TWOMBLY*

Even if harsh conditions of confinement under which a detainee is held fully comply with due-process constraints, federal officials may not impose those conditions on an individual for the purpose of

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[7] The Second Circuit accepted Petitioners' assertion that the ADMAX SHU's harsh conditions of confinement are constitutionally permissible when government officials possess individualized evidence linking a detainee to terrorism. *See* Pet. App. 31a, 46a. Respondents, while contending that that issue "is not relevant to these Petitions," state that they disagree with that assertion. Opp. Cert. Br. 29 n.11. Respondents cite no case law to support their contrary position. Yet, Respondents apparently are prepared to argue that qualified immunity would not bar their due process claims even if the FBI had possessed individualized evidence linking them to terrorism.

discriminating against him on the basis of religion or ethnicity. But Respondents have not alleged any facts that render plausible their intentional discrimination claims against Petitioners. Accordingly, Petitioners are entitled to dismissal of the claims that they violated Respondents' equal protection rights.

Fed.R.Civ.P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated earlier requirements that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

*Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 n.3 (2007).

*Twombly* held that Rule 8(a)(2) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id.* at 556. It held that requiring plausibility "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 557. The Court explained

that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations are merely possible or conceivable. *Id.* at 557, 570.

*Iqbal* applied the Rule 8 pleading standards to claims substantially identical to those raised by Respondents. The plaintiff in *Iqbal* (a citizen of Pakistan arrested following 9/11 for violating immigration laws) sued Ashcroft, Mueller, and other federal officials for the harsh conditions he endured while incarcerated in ADMAX SHU. Reversing the Second Circuit, this Court determined that Iqbal had inadequately pleaded that Ashcroft and Mueller violated his Fifth Amendment rights to substantive due process and equal protection. *Iqbal*, 556 U.S. at 682-83. The Court concluded that although Iqbal claimed that they adopted a policy of detaining individuals in ADMAX SHU "because of their race, religion, or national origin," his *factual* allegations were insufficient to state a plausible discrimination claim. *Ibid.* The Court rejected his assertion that one could infer intentional discrimination from DOJ's hold-until-cleared policy, stating, "All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

*Iqbal*'s logic requires Rule 8 dismissal of Petitioners' claims. The same considerations that led the Court to overturn the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should persuade the Court to once again reverse the appeals

court.

In concluding that Respondents satisfied the Rule 8 pleading standard, the Second Circuit focused primarily on a single factual allegation on which *Iqbal* had not focused: the decision of DOJ officials to merge the New York List with the INS List. The appeals court concluded that the merger decision ensured prolonged detention for those on the New York List because they would thereafter be subjected to DOJ's hold-until-cleared policy. Pet. App. 37a-42a, 59a-62a. It concluded that one could plausibly infer discriminatory intent (as well as an intent to punish without any legitimate governmental objective) from the DOJ Petitioners' approval of the merger because they were aware that: (1) the FBI's New York office had placed many individuals on the New York List despite lacking evidence connecting them to terrorism; and (2) the merger could result in those individuals' being subjected to harsh conditions of confinement for a prolonged period. *Ibid.*

The merging of the two lists will not bear the weight the Second Circuit assigns to it, even putting aside the substantial evidence (catalogued by Judge Raggi in her dissent) that Ashcroft, Mueller, and Ziglar played no role in the merger decision. Even if one assumes that they were aware that some Arab/Muslim men would suffer prolonged detention in ADMAX SHU as a result of merging the lists, the Court has repeatedly cautioned that intentionally invidious discrimination is not demonstrated by showing that a defendant is aware that members of a specific religious or ethnic group will be adversely affected by a challenged decision. As the Court explained in

concluding that Iqbal had inadequately alleged intentional discrimination by Ashcroft and Mueller on the basis of race, religion, or national origin:

> Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effect on an identifiable group. It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

*Iqbal*, 556 U.S. at 676-77 (citations omitted).

By far the most plausible inference one can draw from the decision to merge the lists is that federal officials sought to ensure a thorough review of all potential suspects, thereby minimizing the possibility that any terrorists could slip through the cracks. Petitioners may have been aware, of course, that their decision would result in some Arab/Muslim unauthorized aliens enduring prolonged detention. But while Respondents allege that Petitioners knew that some of those on the New York List were not plausible suspects, there is no allegation that they had

any short-term means of distinguishing such individuals from others who really were associated with terrorist activity. The only means of doing so without risking the release of dangerous individuals was to mandate a thorough review of all those on the New York List—a review that was facilitated by merging the two lists. Because this better-safe-than-sorry rationale is a far more plausible explanation of Petitioners' conduct than is the Second Circuit's intentional-discrimination theory, the factual allegations of Respondents' complaint are insufficient to state a claim for intentional racial, religious, or national-origin discrimination.[8]

The FAC claims that Petitioners were sufficiently familiar with Respondents' individual cases that they knew that "there was no reason to suspect" that the six Respondents had "any connection to terrorism." Opp. Cert. Br. 25 (citing FAC ¶¶ 39-44, 47, 61, and 67). But Respondents have not included any supporting factual allegations that could lend plausibility to their claims regarding Petitioners' knowledge. In the absence of such supporting information, the allegation that the DOJ Petitioners knew that there was no evidence linking Respondents

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[8] The Second Circuit's intentional-discrimination inference is further undercut by the fact that a significant majority of Arab/Muslim males on the FBI List were incarcerated at the Passaic County Jail or other non-federal facilities and thus were not subjected to the harsh conditions experienced by those assigned to the MDC. Pet. App. 147a-148a. It is not plausible to suggest that the DOJ Petitioners intended to discriminate against Respondents *because of* their race, religion, or national origin when a large percentage of similarly situated Arab/Muslim detainees were not subjected to similarly harsh conditions.

to terrorism (or even knew that Respondents were being detained at the MDC) is utterly implausible. Throughout the relevant time period, the DOJ Petitioners were devoting their energies to protecting the Nation during its gravest national security crisis in decades. It defies reason to assert (without supporting factual allegations) that they had the time to become personally familiar with Respondents' cases and had concluded that Respondents were among the aliens added to the New York List despite the absence of evidence suggesting a link to terrorism. Without a plausible factual allegation explaining how, despite all odds, Petitioners acquired such specific knowledge of Respondents' circumstances, Respondents have not adequately pled that the DOJ Petitioners discriminated against them *because of* their race, religion, or national origin.

Respondents assert that their equal protection claim should survive a motion to dismiss because the FAC alleges that they were detained "because of their ethnicity or religion" and because Rule 8 requires that that allegation "must be accepted as true." Opp. Cert. Br. 26 (citing FAC ¶¶ 41, 63-64, 67). But Rule 8 does not require a court ruling on a motion to dismiss to accept at face value bare allegations of discriminatory intent when the facts alleged are more plausibly explained by a nondiscriminatory motive. As *Twombly* explained, Rule 8(a)(2) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. 550 U.S. at 556.

Thus, the Court in *Twombly* declined to accept at face value the plaintiffs' bald allegation that the

Finally, the Second Circuit upheld Respondents' claims that Petitioners' allegedly discriminatory actions violated 42 U.S.C. § 1985(3), which makes it unlawful for "two or more persons" to "conspire ... for the purpose of depriving ... any person or class of persons of the equal protection of the laws." In the absence of any plausible allegations that Respondents were denied "the equal protection of the laws," the FAC's conspiracy claim is equally implausible.

## III. THE SECOND CIRCUIT'S DECISION TO RECOGNIZE A JUDICIALLY INFERRED DAMAGES REMEDY FOR RESPONDENTS' CONSTITUTIONAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT

Petitioners have ably demonstrated that the Second Circuit's unprecedented recognition of a *Bivens* action to challenge Executive Branch national security policy conflicts with decisions of this Court. *Amici* concur with Petitioners' arguments that Respondents' efforts to expand *Bivens* in this manner are unwarranted; we will not repeat those arguments here. *Amici* write separately to emphasize several facets of the issue.

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detainees by individual guards. But Respondents have failed to provide any additional factual allegations to support a claim that Hasty was even aware of complaints. In particular, they have failed to include any allegations to rebut Hasty's much more plausible explanation: that his position as Warden required him to supervise a very large number of activities and that he had properly delegated oversight of detainee complaints to subordinates.

The Court's authority to recognize a new constitutional tort is anchored in its general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, the Court has exercised that authority only sparingly. *Bivens* (decided in 1971) marked the first time that the Court did so. It has done so on only two other occasions (most recently in 1980), and since then has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

The reluctance to extend *Bivens* is grounded in separation-of-powers concerns. Deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy sought, but on who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). The answer is generally Congress, because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act in the public's behalf." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

The Court's *Bivens* case law suggests that it is particularly appropriate to turn to Congress, rather than the courts, to decide whether to recognize a right of action for Respondents' constitutional claims. Those claims implicate important national security issues. As the Court has repeatedly recognized, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Congress may ultimately determine that a damages

remedy would provide an appropriate check against overly harsh treatment of unauthorized aliens who are properly subject to detention and are being investigated for possible connection to terrorism. But Congress has not done so to date, despite its adoption of numerous post-9/11 statutes addressing detention policy. The Second Circuit overstepped judicial bounds by recognizing Respondents' right to assert their constitutional claims.

The Second Circuit held that its recognition of Respondents' right to assert damages claims against Petitioners did not involve a "context" different from that of previously recognized *Bivens*-type actions. According to the appeals court:

> We think it plain that the [Respondents'] conditions of confinement claims are set in the following context: [Respondents], housed in a federal facility, allege that individual officers subjected them to punitive conditions. This context takes account of both the rights injured (here, substantive due process and equal protection rights) and the mechanism of injury (punitive conditions without sufficient cause). The claim—that individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent or without sufficient cause—stands firmly within a familiar *Bivens* context. Both the Supreme Court and this Circuit have recognized a constitutional challenge to conditions of confinement.

Pet. App. 24a (footnote omitted).

But this Court has made clear that the "context" of a proposed *Bivens* action encompasses more than the precise constitutional right being asserted and the "mechanism of injury." For example, the Court has recognized a *Bivens* action asserting that invidious employment discrimination against a congressional staffer violated her equal protection rights. *Davis v. Passman*, 442 U.S. 228 (1979). But the Court later declined to recognize a *Bivens* action asserted by a member of the armed forces asserting invidious employment discrimination. *Chappell v. Wallace*, 462 U.S. 296 (1983). It refused to do so even though the plaintiff in *Chappell* alleged the same constitutional violation and the same "mechanism of injury" (employment discrimination) as the plaintiff in *Davis*. The Court explained that the context was different because of the different setting (the military, with its unique command structure) within which *Chappell* arose. The Second Circuit's refusal to recognize that this case arises in a unique context (the federal government's response to a national security emergency) cannot be squared with *Chappell*.

Because it concluded that this case arose "within a familiar *Bivens* context," the Second Circuit deemed it unnecessary to consider whether any "special factors" counsel hesitation in recognizing Petitioners' right of action. Had it paused to consider such factors, it likely would have realized that recognizing this right of action raises serious national security concerns. Among other things, the threat of being sued for damages might well cause those responsible for responding to future emergencies to shy away from

decisive actions they might otherwise deem necessary to protect national security. If Congress decides that granting increased protections to individual rights (in the form of actions for damages) outweighs those national security concerns, it is authorized to adopt legislation creating a right of action. But such decisions are properly made by Congress, not the courts.

## CONCLUSION

The Court should reverse the judgment of the court of appeals against Petitioners.

Respectfully submitted,

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# In the Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner*,

v.

AHMER IQBAL ABBASI, ET AL.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

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(Additional Captions Listed on Inside Cover)

JOHN D. ASHCROFT, ET AL.,

*Petitioners,*

v.

AHMER IQBAL ABBASI, ET AL.,

*Respondents.*

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DENNIS HASTY, ET AL.,

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## BRIEF OF COMMONWEALTH LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

### INTEREST OF THE *AMICUS CURIAE*[1]

The Commonwealth Lawyers Association ("CLA") is a body dedicated to maintaining and promoting the rule of law throughout the Commonwealth.[2] One of the CLA's objectives is to promote the administration of justice and the protection of human rights. To that end, the CLA has filed *amicus curiae* briefs in this Court in numerous post-9/11 cases, including *Rasul v. Bush*, 542 U.S. 466 (2004), *Boumediene v. Bush*, 553 U.S. 723 (2008), and, more recently, *Meshal v. Higgenbotham*, No. 15-1461, in which the CLA filed an *amicus* brief in support of the still-pending petition for certiorari.

There are significant factual differences between the claims in this case and those in *Meshal*, but there is one overriding similarity. Just as in *Meshal*, the government officials charged with wrongdoing in this case contend that the plaintiffs should, as a matter of law, be denied a remedy under *Bivens v. Six Un-*

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] The Commonwealth is a voluntary association of 53 independent sovereign states, including the United Kingdom, Canada, and Australia. Its 2.3 billion people account for nearly a third of the world's population. A large majority of the Law Societies and Bar Associations of the 53 Commonwealth countries are institutional members of the CLA.

*known Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), because, *inter alia*, the plaintiffs' claims implicate national security concerns. As in *Meshal*, the CLA files this *amicus* brief to show that a *per se* rule foreclosing *Bivens* actions for damages arising out of counterterrorism efforts, as petitioners urge here, would stand in stark contrast to the approach taken by democracies in the Commonwealth and the European Court of Human Rights, which have permitted victims of alleged human-rights violations at the hands of government officials to seek judicial redress even in cases implicating counterterrorism and national security.

## SUMMARY OF THE ARGUMENT

In *Bivens*, this Court recognized an implied cause of action for damages for certain constitutional violations. This case involves *Bivens* claims by non-citizens (respondents here) arrested on immigration charges after the 9/11 terrorist attacks. The dissenting judge below concluded—and petitioners now argue—that the *Bivens* remedy should not be extended to respondents' claims in part because they touch on "the executive's exercise of its national security authority." *Turkmen v. Hasty*, 789 F.3d 218, 275 (2d Cir. 2015) (Raggi, J., dissenting). As the dissent reasoned, the judiciary has only "limited competency to make national security assessments," and the subject, "'particularly in times of conflict, do[es] not admit easy answers.'" *Id.* at 276-77.

The dissent's reluctance to entertain damages actions that implicate "national security"—a reluctance echoed by petitioners here, *see* Ashcroft Br. 26-29; Hasty Br. 29-31; Ziglar Br. 21-22—would close the courthouse doors on those seeking damages for serious human-rights violations that occurred during

terrorism-connected investigations, depriving them of any meaningful remedy for even egregious violations of the Fourth and Fifth Amendments. There is no reason to conclude that government defendants should be given an absolute shield from any and all damages suits simply because the actions constituting the alleged constitutional violations assertedly were undertaken as counterterrorism measures.

Indeed, many Western democracies and the European Court of Human Rights *have* recognized a tort remedy for unlawful actions taken in the name of national security—including in a suit brought by Benamar Benatta, one of the respondents in this very case. To be sure, these foreign courts recognize that various limitations, akin to state secrecy or the act-of-state doctrine, may apply during the litigation of tort claims arising out of illegal detention or interrogation by government actors. But they have not concluded that national security concerns can be a *complete bar* to suit, extinguishing any possibility of a remedy for the government's violation of fundamental rights.

In short, recognizing that damages actions are available even for constitutional violations touching on national security would be consistent not only with *Bivens* itself. It would also be consistent with this Court's longstanding role as one of the world's preeminent constitutional courts and a leader in the development of the rule of law.

## ARGUMENT

### I. The Court Should Consider The Practices Of Other Western Democracies And The European Court Of Human Rights In Deciding Whether To Recognize A *Bivens* Remedy.

Whether to recognize a *Bivens* action for damages for the violation of a constitutional right requires "a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In deciding whether to allow damages claims by individuals who allegedly suffered serious constitutional violations in connection with counterterrorism measures, the Court's judgment should be informed by the experience of other Western democracies, many of which have made damages remedies available even in cases implicating national security.

This Court has looked to foreign law to assist in construing and implementing constitutional guarantees on many occasions. *Bivens* itself may be seen as an outgrowth of a "foreign" principle—namely, that "settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress"—first recognized by this Court in *Marbury v. Madison*, 5 U.S. 137, 163 (1803). See *Bivens*, 403 U.S. at 397 ("'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'") (quoting *Marbury*, 5 U.S. at 163).

In recent years, the Court has frequently considered the law in other countries in deciding constitutional issues. For example, the Court examined foreign practice concerning the execution of juvenile

and mentally disabled offenders in construing the Eighth Amendment's prohibition on "cruel and unusual" punishment. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988). Likewise, the Court consulted decisions by the European Court of Human Rights and various national high courts in holding that a law criminalizing sexual relations between consenting adults violated the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003).

The Court has also looked abroad in deciding both substantive and remedial questions about the constitutional provisions implicated here. In *Miranda v. Arizona*, 384 U.S. 436 (1966), for instance, the Court referenced the practices of English, Scottish, and Indian courts, concluding that their experience "suggests that the danger to law enforcement in curbs on interrogation is overplayed." *Id.* at 486-90; *cf. New York v. Quarles*, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part) ("The learning of [foreign] countries was important to the development of the initial *Miranda* rule. It therefore should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today."). In *Wolf v. Colorado*, 338 U.S. 25, 27-30 (1949)—and again in *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977)—the Court considered the practice of Commonwealth jurisdictions to construe the Fourth Amendment's substantive guarantee and to determine the proper means of "enforcing such a basic right." *Wolf*, 338 U.S. at 28.

Quite properly, none of these cases treated foreign decisions as *determinative* of the constitutional question. In *Roper*, for example, the Court explained that "[t]he opinion of the world community, while not controlling our outcome, * * * provide[s] respected

and significant confirmation for our own conclusions" regarding the Eighth Amendment. 543 U.S. at 578. And the weight of foreign practice does not preclude this Court from going its own way. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf*). At the same time, however, these cases demonstrate that foreign law—particularly from other Western democracies—is often relevant to the interpretation and implementation of constitutional provisions.

As Justice Breyer has put it, "other democracies with the same commitment to basic human rights have led the way in developing solutions to the problem we face, and * * * we may learn something from examining their practices rather than considering our own in a vacuum. * * * [T]heir examples can help us to find our own Constitution's answer to what is ultimately an American constitutional problem." STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 83 (2015).[3]

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[3] See also, *e.g.*, Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 332 (2004) (suggesting that the Court should look to foreign jurisprudence to inform "the dynamism with which we interpret our Constitution" and "the extraterritorial application of fundamental rights"); Sandra Day O'Connor, *Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y OF INT'L L. PROC. 348, 350 (2002) ("While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."); WILLIAM H. REHNQUIST, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE 411-412 (Paul Kitchof et al. eds., 1993) ("[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States

Resort to foreign law is particularly appropriate in the *Bivens* context, which concerns not the substantive content of a constitutional provision, but rather "the best way to *implement* a constitutional guarantee." *Wilkie*, 551 U.S. at 550 (emphasis added). In other words, the *Bivens* inquiry does not ask what types of governmental conduct should be prohibited by the Constitution. Instead, it takes the Fourth and Fifth Amendments' guarantees as given and asks what *remedy* should be available to litigants—absent an "explicit congressional declaration" of policy (*Bivens*, 403 U.S. at 397)—when those guarantees are violated. What is more, the Court's decision to authorize a *Bivens* remedy is itself revisable by Congress. *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("When Congress provides an alternative remedy, it may, of course, indicate its intent * * * that the Court's power should not be exercised."); William Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 640 (2006) ("the *Bivens* remedy is best con-

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courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."). Of course, the path of influence runs both ways: foreign courts periodically look to this Court's decisions for guidance. See, *e.g.*, Paul von Nessen, *Is There Anything to Fear in Transnationalist Development of Law? The Australian Experience*, 33 PEPP. L. REV. 883, 917 (2006) (noting that the High Court of Australia cited this Court's decisions on more than 1500 occasions between 1991 and 2002); Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 220 (1994) (article by then-Justice of the Supreme Court of Canada observing that "the use of foreign material affords another source, another tool for the construction of better judgments," and that "[i]n this era of increasing global interdependence, and in particular of even closer American-Canadian relations, it seems normal that there should be increased sharing in and among our law and lawyers as well").

ceptualized as a federal common law remedy * * * subject to congressional control").

At bottom, applying *Bivens* necessarily "is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). That, in turn, requires the Court to take into account the likely consequences of implying a damages remedy. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004) ("whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"). And the experiences of other judicial systems that have allowed plaintiffs to maintain similar claims provide strong evidence of whether adverse consequences might follow from recognizing a *Bivens* remedy here—"cast[ing] an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). It is therefore entirely appropriate to consider foreign law in determining the scope of the *Bivens* remedy.

## II. Barring Any Remedy In This Case Would Be At Odds With Foreign Decisions And Practice.

There is nothing unusual, or unworkable, about recognizing a damages remedy for human-rights violations committed by government officials in connection with counterterrorism measures. Indeed, several Western democracies and the European Court of Human Rights have permitted victims of such violations to seek redress.

### A. Other Nations Provide Monetary Remedies For Human-Rights Abuses In Alleged Terrorism-Related Cases.

Other Western democracies participating in global counter-terrorism efforts have consistently provided remedies for human-rights violations allegedly committed by government officials, as the following examples show.

***Canada.*** In several recent cases, Canada has recognized its obligation to provide an effective monetary remedy when its officials are complicit in human-rights violations. Notably, the list includes litigation brought by one of the respondents here: Benamar Benatta.

In the Second Circuit's words, Benatta, an Algerian national, "was originally detained by Canadian authorities on September 5, 2001, after crossing the Canadian border with false documentation. Following the September 11 attacks, Benatta was transported back to the United States and detained in the challenged conditions of confinement and pursuant to the post-9/11 investigation." *Turkmen*, 789 F.3d at 225 n.4. He was cleared of any involvement in the attacks but remained in U.S. custody for five more years.[4] Benatta ultimately returned to Canada, where he was granted refugee status.

In 2007, Benatta sued the Canadian government for its role in his extended detention and mistreat-

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[4] The government indicted Benatta for allegedly possessing a false identity card and a fraudulently procured U.S. Alien Registration Receipt card, but the charges were dismissed after the magistrate judge recommended dismissal on speedy trial grounds. *United States v. Benatta*, 2003 WL 22202371 (W.D.N.Y. Sept. 12, 2001).

ment, alleging several violations of his Canadian Charter rights. Statement of Claim, *Benatta v. Canada*, 07-cv-3366B PD3 (Ont. S.C. July 16, 2007), *available at* http://www.cbc.ca/toronto/news/pdf/benatta-statement-091207.pdf. The parties litigated the case on the merits, *see Benatta v. Attorney General of Canada*, 2009 O.J. 5392 (Ont. S.C. Dec. 11, 2009), and eventually reached a large monetary settlement in 2015, on the eve of trial. Paul McLeod, *Canada Paid $1.7 Million To A Man Deported One Day After 9/11*, BuzzFeed News, Dec. 7, 2015, https://www.buzzfeed.com/paulmcleod/canada-paid-17-million-to-man-deported-one-day-after-911; Jim Bronskill, *Refugee sent to U.S. after 9/11 settles lawsuit against Ottawa*, THE GLOBE AND MAIL, Mar. 9, 2015.

Canada has recognized its obligation to pay damages in other national security-related cases as well. Canadian citizen Maher Arar brought a civil suit seeking damages for the Canadian government's role in his torture and detention in Syria following his arrest by American officials in September 2002 based on inaccurate information provided by Canadian officials. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* 57 (2006); Ian Austen, *Canada Reaches Settlement With Torture Victim*, N.Y. TIMES, Jan. 26, 2007. The Canadian government settled Arar's claims for $9 million and offered a formal apology for its role in Arar's "terrible ordeal." *Ibid.*[5]

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[5] Arar brought a similar suit against the United States, but the Second Circuit dismissed it outright, holding, over several strong dissents, that he had no cause of action for the govern-

Three other Canadian citizens asserted similar tort claims after a government investigation found that they were confined and tortured in Syria as the indirect result of actions of Canadian officials. Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* 35-39 (2008). Although the Canadian government has sought to bar or limit access to documents and other evidence on national security grounds, *e.g.*, *Attorney General of Canada v. Almalki*, 2015 FC 1278 (DES-1-11 Nov. 23, 2015), it has not objected to the maintenance of a civil suit for damages. And in 2014, the Federal Court of Ontario permitted Omar Khadr, a Canadian detained at Guantánamo at the age of fifteen, to sue the Canadian government for damages for allegedly violating his Canadian Charter rights. *Khadr v. Canada*, 2014 FC 1001 (T-536-04 Nov. 4, 2014).

***United Kingdom.*** Cases brought by Binyam Ahmed Mohamed, a U.K. resident and asylum grantee, similarly illustrate how U.K. courts have handled damages claims in cases involving national security considerations. Following his arrest in Pakistan in 2002 for suspected membership in al-Qaeda, Mohamed was forcibly transferred to Morocco, where he was allegedly detained and tortured by local authorities. U.S. authorities subsequently detained and allegedly tortured Mohamed at several locations, including, ultimately, Guantánamo. *The Queen on the Application of Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin) 2048 [2], [5]-[7], [41], [65]-[68] (Q.B.). The

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ment's violation of his basic human rights. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

United States dropped all charges against Mohamed and released him in 2009. Kevin Sullivan, *Freed Detainee in U.K. Tells of Abuse by U.S.*, WASH. POST, Feb. 24, 2009, at A1.

While detained at Guantánamo, Mohamed filed a civil case seeking to compel the U.K. Foreign Secretary to provide information about his rendition and treatment for his trial before a U.S. Military Commission. *Application of Mohamed*, [2008] EWHC (Admin) 2048 [2], [45], [123]-[126], [135]-[138], [147]. A U.K. court determined that factors including "[t]he importance of the state's prohibition on torture" justified compelling production of certain materials. *Id.* at [3], [46], [87]-[91], [98]-[108], [123]-[126], [139]-[147].

Following his release from Guantánamo, Mohamed and five other British citizens and residents also formerly detained at Guantánamo filed tort claims seeking damages from U.K. government agencies for complicity in their alleged arbitrary detention and torture at Guantánamo and other foreign locations. *Al Rawi v. Security Service*, [2010] EWCA (Civ) 482, [2010] W.L.R. 1069 [1071]-[1075] (A.C.) (Eng.). The government did not seek to bar the claims from the outset, nor did the court suggest that such a result would be permissible. Instead, the lower court and the court of appeal adopted procedural accommodations to address the government's national security concerns. *Id.* at [1072]-[1078], [1088]-[1089]. The government ultimately settled with the *Al Rawi* claimants for significant, confidential sums. *Government to compensate ex-Guantánamo Bay detainees*, BBC NEWS (Eng.), Nov. 16, 2010.

About a year after the *Al Rawi* settlement, two U.K. citizens brought a similar tort suit alleging that

the government participated in their illegal arrest, detention, and torture in Somaliland. Again, the U.K. court allowed the case to proceed after granting the government's request for procedural accommodations to address its national security concerns. *Mohamed v. Foreign and Commonwealth Office*, [2013] EWHC (Q.B.) 3402, [2014] 1 W.L.R. 1699 (Q.B.).

Nor has the U.K. limited remedies for arbitrary detention and torture to its own citizens and residents. It paid £14 million in compensation to Iraqis who brought civil cases alleging arbitrary detention and torture by the U.K. government during the Iraq war. Ian Cobain, *MoD pays out millions to Iraqi torture victims*, THE GUARDIAN (Eng.), Dec. 20, 2012. And it paid £2.2 million to settle a civil suit by a Libyan citizen for damages based on the U.K.'s alleged complicity in his rendition to Libya, where he was detained and tortured. Dominic Casciani, *UK pays £2.2m to settle Libyan rendition claim*, BBC NEWS (Eng.), Dec. 13, 2012.[6]

In short, the U.K. has permitted its citizens and others to bring civil actions to recover damages for alleged human-rights violations by U.K. officials. And U.K. courts address potential national security implications in these cases—such as concerns about the disclosure of sensitive information—through tailored procedural accommodations, not peremptory dismissal.

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[6] Appeals from two other civil judgments involving allegations by non-citizens of rendition and torture are currently pending before the U.K. Supreme Court. *Belhaj v. Straw*, [2014] EWCA (Civ) 1394, [2014] 2 W.L.R. 1105 (A.C.) (Eng.); *Rahmatullah v. Ministry of Defence*, [2014] EWHC 3846 (Q.B.).

***Australia.*** Following his release from Guantánamo without charge in 2005, Mamdouh Habib, an Australian citizen, brought a tort suit alleging that Australian officials aided and abetted his unlawful detention in Pakistan after 9/11 and his subsequent detention and torture by U.S. agents in foreign locations, including Guantánamo. *Habib v. Commonwealth of Australia*, (2010) 183 F.C.R. 62. The government of Australia did not seek to bar Habib's claims on the grounds that they involved national security. However, it did raise a related argument that Australia's act-of-state doctrine rendered some of Habib's claims non-justiciable. Citing this Court's decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Australian court explained that under that doctrine, "'the Courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.'" *Habib*, 183 F.C.R. 62 at ¶¶ 22, 72 (quoting *Underhill*, 168 U.S. at 252).

But the panel unanimously determined that the act-of-state doctrine did not bar Habib's claims. *Id.* ¶ 2 (Order). One judge explained that when a plaintiff "alleges before a Court exercising federal jurisdiction that Commonwealth officers acted outside the law," "[t]he justiciability of such allegations is axiomatic." *Id.* at ¶ 37 (Perram, J.).[7] And the two other judges opined that the government's "invocation of the act of state doctrine, if accepted, [would] preclude the truth or otherwise of the allegations founding the claim from being tested and determined," meaning

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[7] In reaching this conclusion, Judge Perram relied heavily on the "constitutional norms" that Australian courts had drawn from *Marbury v. Madison*, 5 U.S. 137 (1803)—a case that, as explained *supra* at p. 4, also grounds the *Bivens* remedy. *See Habib*, 183 F.C.R. 62 at ¶¶ 25, 27, 29.

that Australian government "officials could not be held accountable in any court." *Id.* ¶¶ 110, 114 (Jagot, J.); *see also id.* ¶ 1 (Black, C.J.) (agreeing with Judge Jabot's reasons for judgment).

Australia's willingness to provide a damages remedy even when underlying conduct implicates the national-security efforts of *other* governments underscores how anomalous it would be for this Court to deny respondents a remedy for alleged misconduct by agents of the U.S. government itself. Indeed, after the Federal Court's decision in the case above, the Australian government ultimately settled Habib's case for an undisclosed sum. Dylan Welch, *Secret Sum Settles Habib Torture Compensation Case*, SYDNEY MORNING HERALD, Jan. 8, 2011.

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As these examples demonstrate, Commonwealth democracies on three continents have provided a damages remedy for alleged human-rights violations by their agents, even where the actions giving rise to the claims were taken in the name of national security.

### B. The European Court Of Human Rights Likewise Provides Monetary Remedies For Human Rights Violations In Cases Implicating National Security.

The European Court of Human Rights—an international court established by and charged with enforcing the European Convention on Human Rights (the "Convention")—likewise has awarded damages in several recent terrorism cases. As that Court recently explained, "[w]here an individual has an arguable claim that he has been ill-treated by agents of the State," an "effective remedy" under the

Convention entails "payment of compensation where appropriate," "a thorough and effective investigation," and judicial "scrutiny * * * carried out without regard to what the person may have done * * * or to any perceived threat to the national security" posed by judicial review of the defendant's acts. *El-Masri v. The Former Yugoslav Republic of Macedonia*, Eur. Ct. H.R., 75-76 (2012).

In *El-Masri*, the plaintiff (a German and Lebanese citizen) was suspected of having ties to al-Qaeda, taken into custody by Macedonian agents while traveling in Macedonia, and then turned over to U.S. intelligence officials, who detained him incommunicado for months and tortured him in an attempt to extract a confession regarding his suspected terrorist connections. *Id.* at 3-8, 12-17, 21-24, 47-52. El-Masri was never charged with a crime and ultimately was released. *El-Masri*, Eur. Ct. H.R. at 21-22.

The European Court in *El-Masri* held Macedonia responsible for participating in and enabling the CIA's torture and arbitrary detention of El-Masri in violation of the Convention. *El-Masri*, Eur. Ct. H.R. at 52-73, 78-79. The European Court determined that conduct by Macedonian agents including incommunicado detention, interrogation, solitary incarceration, and repeated threats of death violated El-Masri's fundamental rights. *Id.* at 62. As a remedy for its violations of the Convention, the European Court ordered Macedonia to pay €60,000 to El-Masri, citing in support several of the cases discussed above, including Canada's settlement in *Arar* and the U.K.'s settlement in *Al Rawi*, as well as two compensatory payments made by Sweden to individ-

uals for its complicity in violations of their human rights. *Id.* at 35, 41, 78-79.[8]

The European Court in *El-Masri* emphasized that:

> [A]n adequate response by the authorities in investigating allegations of serious human rights violations * * * may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

*Id.* at 60. This remains the case, the European Court explained, "even in the most difficult circumstances, such as the fight against terrorism." *Ibid.*

The European Court reiterated the same principle a year-and-a-half later in the companion cases of *Al Nashiri v. Poland*, Eur. Ct. H.R., 187 (2014), and

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[8] In a pair of decisions issued in 2005 and 2006, United Nations Committees determined that Sweden violated the rights of two Egyptian citizens who had sought asylum in Sweden, Ahmed Agiza and Mohammad al-Zery. Sweden denied asylum to Agiza and al-Zery and approved their expulsion to Egypt, where they were detained and tortured by Egyptian authorities notwithstanding Egypt's diplomatic assurances that they would not be mistreated. *Agiza v. Sweden*, Comm'n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005); *al-Zery v. Sweden*, Comm'n No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006). In its *Agiza* decision, the U.N. Committee Against Torture "observe[d] that in the case of an allegation of torture or cruel, inhuman or degrading treatment * * * the right to a remedy requires * * * an effective, independent and impartial investigation of such allegations," even where a case presents "national security concerns." *Agiza*, at 13.7-13.8. Sweden subsequently agreed to pay Agiza and al-Zery $450,000 each in compensation for its role in their abuse. *Sweden Compensates Egyptian Ex-Terror Suspect*, USA TODAY, Sept. 19, 2008.

*Husayn (Abu Zubaydah) v. Poland*, Eur. Ct. H.R., PDF pp. 151-52 (2014). In those cases, the European Court ordered Poland to pay a combined €262,000 in damages for its role in enabling the CIA's detention in a secret CIA prison in Poland and subsequent forcible transfer to Guantánamo of al Nashiri and Husayn, both suspected of being al-Qaeda terrorists. *Al Nashiri*, Eur. Ct. H.R. at 1, 215-216; *Husayn*, Eur. Ct. H.R. at PDF pp. 9, 168-170. The European Court found that because Poland was complicit in or should have foreseen multiple violations of the Convention, both in its territory and at Guantánamo, Poland was liable for those violations under the Convention. *Al Nashiri*, Eur. Ct. H.R. at 161-216; *Husayn*, Eur. Ct. H.R. at PDF pp. 137-170.

The European Court in *Al Nashiri* and *Husayn* explained that even where a case implicates "national-security issues" and arises in the context of "the fight against terrorism,"

> it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests.

*Al Nashiri*, Eur. Ct. H.R. at 187; *Husayn*, Eur. Ct. H.R. at PDF pp. 151-152. The European Court condemned (and drew negative inferences based on) Poland's invocations of national security and state secrecy to justify a blanket "refusal to submit evidence" relevant to these cases. *Al Nashiri*, Eur. Ct. H.R. at 142-146; *Husayn*, Eur. Ct. H.R. at PDF pp. 121-124. The proper course, the European Court held, is in-

stead to implement procedural accommodations tailored to the specific evidence posing security concerns. *Ibid.*

Most recently, in February of this year, the European Court ordered Italy to pay a combined €115,000 to terrorist suspect Osama Mustafa Hassan Nasr and his wife Nabila Ghali for multiple violations of the Convention. Press Release, Eur. Ct. H.R., *Nasr and Ghali v. Italy* (Feb. 23, 2016). (The opinion itself has not yet been translated into English.) Building from principles established in *El-Masri*, *Al Nashiri*, and *Husayn*, the European Court determined that the CIA's abduction of Nasr on the streets of Italy and subsequent incommunicado detention and ill-treatment of Nasr in Egypt qualified as arbitrary detention and torture of Nasr, inhuman and degrading treatment of his wife Ghali, and interference with Nasr's and Ghali's privacy and family rights in violation of the Convention. *Id.* at 4-6. The European Court found Italy responsible for failing to take measures to prevent these actions, *ibid.*, and further determined that "the investigation carried out by [Italian] national authorities * * * had been deprived of its effectiveness" through improper invocations of state secrecy in an attempt to "ensure that those responsible did not have to answer for their actions." *Id.* at 4, 6. The Court reiterated the need for "practical and effective remedies" for torture and arbitrary detention, including "an award of compensation" where appropriate. *Id.* at 6.

### C. Other Western Democracies And The European Court Of Human Rights Recognize Damages Actions Even Where National Security Is Implicated.

Other Western democracies and international

courts ensure effective monetary remedies for human rights violations by state officials. They reject government arguments that state secrecy and national security considerations should foreclose judicial review entirely, instead addressing such considerations through tailored procedural accommodations.

The responses of other Western democracies to allegations of their own governments' involvement in human rights abuses, including abuses committed in terrorism-related investigations, reflect their recognition that "a civilized polity, when it errs, admits it and seeks to give redress." *Arar v. Ashcroft*, 585 F.3d 559, 638 (2d Cir. 2009) (Calabresi, J., dissenting). As the European Court of Human Rights has recognized, a vehicle for judicial scrutiny is "essential" to "maintain[] public confidence" and "prevent[] any appearance of collusion in or tolerance of unlawful acts." *El-Masri*, Eur. Ct. H.R. at 60. Just as in other Western democracies, individuals in the United States should not be barred from seeking judicial redress for alleged violations of their constitutional rights by government officials, even when the actions constituting the alleged violations were taken in the name of national security.

## CONCLUSION

This Court should affirm the appellate court's conclusion that the respondents are entitled to pursue an implied right of action under *Bivens* for the alleged violations of their constitutional rights.

Respectfully submitted.

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RECORD AND BRIEF



Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,
*Petitioner,*
v.
AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

JOHN D. ASHCROFT, former U.S. Attorney General, and ROBERT MUELLER, former Director of the FBI,
*Petitioners,*
v.
AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

DENNIS HASTY and JAMES SHERMAN,
*Petitioners,*
v.
AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICI CURIAE* FORMER CORRECTIONAL OFFICIALS IN SUPPORT OF RESPONDENTS

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## INTERESTS OF *AMICI CURIAE*

***Amici curiae*** are former correctional directors and administrators with extensive on-the-ground experience supervising prisons and jails throughout the United States.[1] *Amici* respectfully submit this brief in support of Respondents Ahmer Iqbal Abbasi, *et al.*

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**Brian Fischer** spent forty-four years in corrections, serving as Commissioner of the New York State Department of Corrections from 2007 until 2013. Prior to retiring, he consolidated the Division of State Parole and the Department of Corrections into the Department of Corrections and Community Supervision, downsizing the agency by closing prison farms, annexes, camps, and several medium-security prisons.

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[1] No counsel for any party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. Communications reflecting consent from the parties have been filed with the Clerk's office along with this brief.

**Martin F. Horn** served as the Secretary of Corrections of Pennsylvania from 1995 until 2000. He was also the Commissioner of the New York City Department of Correction and of the New York City Department of Probation for seven years. He is currently the Distinguished Lecturer in Corrections at the John Jay College of Criminal Justice and the Executive Director of the New York State Sentencing Commission.

**Justin Jones** served as Director of the Oklahoma Department of Corrections from 2005 to 2013. He has more than thirty-five years of experience in the field of corrections.

**Steve J. Martin** is the former General Counsel/Chief of Staff of the Texas prison system. He has worked as a correctional officer, including on death row, as a probation and parole officer, and as a prosecutor. He has testified before the U.S. Congress and many other oversight bodies, and has extensive experience in the development of correctional standards, policies, procedures, and guidelines across the United States. As a correctional expert for the U.S. Department of Justice (the "DOJ") and as a consultant in over forty states, he has visited or inspected more than 700 confinement facilities.

**Ronald McAndrew** is a prison and jail consultant who has been retained in more than 300 cases throughout the United States and abroad. Previously, he served as Director of Orange County Jail, Orlando, Florida between 2001 and 2002. He also served as Warden, Central Florida Reception Center, Orlando, Florida (1998–2001); Warden, Florida State Prison, Raiford, Florida (1996–98); Warden, Gulf Correctional Institution, Wewahitchka, Florida (1992–96); Deputy

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**Eldon Vail** served as Secretary of the Washington State Department of Corrections from 2007 to 2011. He has over thirty years' experience in the field of corrections. He previously was Warden at three adult institutions, including facilities that housed maximum, medium, and minimum-security inmates. He has also served as an expert witness and correctional consultant on security issues and conditions of confinement in prisons and jails across the country.

**Jeanne Woodford** is the former Director and Acting Secretary of the California Department of Corrections and Rehabilitation. She began her career as a correctional officer at California's San Quentin State Prison, rising to the rank of Warden there.

## SUMMARY OF ARGUMENT

*Amici* are deeply concerned by the claims advanced by the Petitioners Dennis Hasty and James Sherman, former Metropolitan Detention Center (the "MDC") wardens (the "MDC Petitioners"). In particular, the MDC Petitioners claim that they are immunized from liability for subjecting detainees to abusive conditions of confinement on the basis of race, religion, or national origin because they acted on orders from law-enforcement officials. That position contradicts the relevant regulations and our experience and practices as correctional officials. As one former federal Bureau of Prisons (the "BOP") director wrote, "Society should expect that prisons will protect public safety" and "that inmates will be confined safely and humanely." J. Michael Quinlan, *What Should the Public Expect from Prisons—Overcoming the Myths*, Federal Prisons Journal 1 (Summer 1990), at 6. It is this expectation that we urge the Court to vindicate.

*Amici* write to highlight three important reasons the MDC Petitioners should be held accountable for the alleged mistreatment of Respondent detainees. First, wardens have sweeping and binding authority over correctional institutions. It is therefore more than plausible that they approved, or were aware of and failed to discontinue, official and unofficial policies and practices involving highly restrictive confinement, impermissible strip searches, and the physical and verbal mistreatment of detainees by correctional officers.

Second, BOP regulations and policies proscribe segregating and restrictively confining detainees on non-individualized grounds and on the basis of race, religion, or national origin. These regulations and policies also prohibit any physical or verbal abuse of

detainees. Respondents more than plausibly allege that the MDC Petitioners either directly violated these proscriptions or knew of the alleged violations and failed to prevent them. Moreover, reports from the DOJ Office of the Inspector General (the "OIG") are consistent with Respondents' allegations regarding treatment of detainees that violated BOP regulations and policies.

Finally, the MDC Petitioners' argument that they are immune from liability because they followed "orders" from the FBI and the BOP fails for several reasons. First, the argument that the FBI's terrorism designations constituted orders mischaracterizes as hierarchical what is, in fact, a co-equal relationship between DOJ agency components—the FBI and the BOP. Second, compliance with the BOP's "highly restrictive conditions" policy for detainees apprehended in the FBI's post-9/11 investigation did not actually require that the MDC Petitioners disregard well-established and binding BOP policies requiring individual assessments for detainees placed in restrictive confinement and prohibiting such confinement based on racial, religious, or ethnic grounds. Third, the MDC Petitioners ignore that neither the FBI nor the BOP even arguably ordered much of the mistreatment alleged in the Fourth Amended Complaint. Finally, wardens are not obligated to follow orders that violate established prison policies and that serve no legitimate penological objective. Indeed, affording inmates and detainees their established procedural and constitutional protections does not undermine the criminal-justice system's chain of command; to the contrary, it ensures both the proper functioning of prisons and inmate and detainee safety.

## ARGUMENT

### I. THE ABUSES DOCUMENTED IN THE OIG REPORT AND COMPLAINT COULD ONLY HAVE OCCURRED WITH THE MDC PETITIONERS' COMPLICITY

The OIG's reports on conditions at the MDC[2] and Respondents' Fourth Amended Complaint recount a series of abuses and conditions of confinement that could not have occurred but for the MDC Petitioners' direct involvement in, or their awareness of and failure to prevent, the unlawful conduct. Correctional literature, best practices, and psychological studies draw a direct line between institutional supervisors' actions or inaction and inmate or detainee abuse, particularly when discrimination animates the abuse.

#### A. Wardens Are Uniquely Positioned Not Only to Direct, but Also to Prevent, Unlawful Conditions of Confinement and Mistreatment of Detainees

Wardens and correctional supervisors play vital roles within a correctional facility. Decades of correctional literature make patently clear that a warden

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[2] Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003) (the "OIG Report"); Office of the Inspector General, U.S. Dep't of Justice, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (Dec. 2003) (the "Supplemental OIG Report"). The OIG Report is available at https://oig.justice.gov/special/0306/full.pdf, most of which is found at J.A. 34–335. The Supplemental OIG Report is available at https://oig.justice.gov/special/0312/final.pdf, and can be found at J.A. 336–416.

has ultimate responsibility for what happens in a correctional institution. Clemens Bartollas & Stuart J. Miller, Correctional Administration 112, 116 (1978); Nancy M. Campbell, Nat'l Inst. of Corrections, Correctional Leadership Competencies for the 21st Century: Manager and Supervisor Levels 10–14 (2006). Correctional supervisors are responsible for the work of officers whom they command, Bartollas & Miller, *supra*, at 178, and they shape the culture of the institution. Campbell, *supra*, at 27 ("Managers and supervisors determine the legitimacy of governmental institutions as the frontline agents of leadership and management.").

This literature, which is consistent with the experience of *amici*, also makes clear that the decisions of a warden drive both the successes and failures of an institution. *See* John DiIulio, Jr., No Escape: The Future of American Corrections 12 (1991) ("Poor prison and jail conditions are produced by poor prison and jail management; cruel and unusual conditions are the product of failed management."); Campbell, *supra*, at 35 ("Supervisors carry the ethical culture of the organization. If they fail, the organization fails."); Stan Stojkovic & Mary Ann Farkas, Correctional Leadership: A Cultural Perspective 99 (2003) ("The moral sense of a prison is determined by the efforts of correctional leaders."). A correctional supervisor's actions and judgments create concrete and serious consequences for the frontline staff and detainees. *See* Campbell, *supra*, at 26–27; *id.* at 32 ("Every action sets a precedent, shapes expectations, and influences how others will behave in the future.").

Well-run prisons require wardens who "make frequent on-site institutional tours." John J. DiIulio, Jr., Governing Prisons: A Comparative Study of

Correctional Management 241 (1990 ed.). Successful prison leaders "are highly 'hands-on' and pro-active. They pay close attention to details and do not wait for problems to arise but attempt to anticipate them." *Id.* at 242; *see also* Kevin N. Wright, Effective Prison Leadership 17 (1994) ("Pursuit of quality in prison administration requires dogged attention to detail."); Stojkovic & Farkas, *supra*, at 107–08 (stressing importance of "correctional presence by management and leadership").

Correctional supervisors are also responsible for protecting detainees from discrimination. Correctional leadership is especially critical when "[r]acial, cultural, [and] religious . . . differences compound the power inequality and vulnerability of both offenders and correctional personnel." Campbell, *supra*, at 27. These immutable differences can create a "tinderbox" in detention centers that easily ignites in "anger, misunderstanding, or violence." *Id.* at 35. But it is the affirmative duty of correctional supervisors to ensure that the safety and rights of detainees are respected "even under difficult circumstances." *Id.* at 26.

Laws, regulations, policies, and supervisor oversight enable a prison to maintain security while at the same time protecting detainees from correctional-officer abuses. These protections are most vital in times of high anxiety when racial and religious prejudices can take violent form. Correctional supervisors have the power—and the responsibility—both to be aware of and to prevent these potential conflicts in prisons. *Id.* And, to be sure, there is an obligation for prison administrators not to incite discriminatory and abusive treatment themselves.

### B. The Absence of Effective Correctional Leadership Leads to Abuses

Prison leaders' actions regarding (or indifference to) humane treatment of detainees can lead directly to correctional officers' abuse of detainees. One needs to look no further than Philip Zimbardo's seminal study of prison society—the Stanford Prison Experiment—to appreciate this dynamic.

Zimbardo constructed a simulated prison and selected twenty-one volunteers to participate as either "guards" or "prisoners" in a two-week experiment. Philip Zimbardo et al., *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l. J. Criminology & Penology 69, 73 (1973) ("*Interpersonal Dynamics*"). Guards, working in eight-hour shifts and without supervision or policy guidance, were responsible for maintaining prison routines—such as meals, a prescribed work regimen, and recreation time—and for preserving prison security through disciplinary measures when necessary. In a matter of days, the prison became a zone of intense hostility, harassment, and outright aggression. *See id.* at 80–81, 89. In the absence of rules, regulations, or supervisor intervention, a cruel and capricious power dynamic developed, and the guards committed abuses. For example, guards regularly cursed and insulted prisoners, unnecessarily handcuffed and blindfolded them, forced some into a two-by-two closet for solitary confinement, force-fed those who refused to eat, and made them do demeaning tasks, including cleaning the cell-block's toilets with their bare hands. Philip Zimbardo et al., *A Pirandellian Prison: The Mind is a Formidable Jailer*, N.Y. Times Mag., Apr. 8, 1973, at 38. The exercise of arbitrary power over every aspect of the prisoners' daily existence drove some of the prisoners into fits of crying, rage, depression, and

anxiety so acute that five of them had to be excused from the study. *Id.*; *Interpersonal Dynamics*, *supra*, at 81. Zimbardo later declared that the same forces that contributed to the abuses observed in the experiment—including "no supervision . . . and no accountability"—may have contributed to the abuses perpetrated against detainees by U.S. military guards at the Abu Ghraib prison in Iraq. Melissa Dittmann, *What Makes Good People Do Bad Things?*, Am. Psych. Assoc. (Oct. 2004), *available at* http://www.apa.org /monitor/oct04 /goodbad.aspx.

The results of Zimbardo's experiment are consistent with the experience of *amici* and correctional literature. For example, addressing the abuse at Abu Ghraib, Major General Antonio M. Taguba noted that "many of the problems inherent in the 800th MP Brigade were caused or exacerbated by poor leadership and the refusal of [the] command to both establish and enforce basic standards and principles . . . ." Seymour M. Hersh, *Torture at Abu Ghraib,* New Yorker (May 10, 2004). Correctional officers need to know that their leaders support compliance with proper policies and practices, and correctional leaders must in turn manifest those beliefs through their words and actions. Stojkovic & Farkas, *supra*, at 112.

### C. Wardens' Actions That Encourage Discrimination Are Especially Likely to Produce Abuses by Frontline Correctional Officers

Wardens' discriminatory directives and epithets leveled at prisoners can cause frontline officers to dehumanize and mistreat prisoners. In a Harvard University experiment conducted several years after the Stanford experiment, students were told to deliver electric shocks—at intensities of their choosing—to a

member of another group for providing inadequate solutions to problems. Albert Bandura et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. Res. in Personality, 253–69 (1975), https://web.stanford.edu/dept/psychology/bandura/pajares/Bandura1975.pdf [https://perm a.cc/LV47-PTSM]. One group of student-punishers was allowed to overhear one of the "test" administrators describe the members who were to be shocked as "animals" before the test began; another group was allowed to overhear the administrator describe the group as "nice." The punishers were more likely to deliver what they thought were increased levels of electrical shock to members they had heard described as "animals." *Id.* at 266 ("Dehumanized performers were treated more than twice as punitively as those invested with human qualities . . . ."). In fact, "subjects gradually increased their punitiveness toward dehumanized and neutral performers even in the face of evidence that weak shocks effectively improved performance and thus provided no justification for escalating aggression." *Id.*

The "Blue Eyes/Brown Eyes Exercise" further illustrates the effects of an authority's treating class members as an "out-group." *See generally* William Peters, A Class Divided: Then and Now (expanded ed. 1987). In that exercise, classroom participants were segregated into two groups based on eye color. The authority figure treated participants with blue eyes as part of the "out-group" in various ways. Through the course of the day, members of the "out-group" were considered inferior, teased by other participants, and verbally abused based on nothing more than their eye color. *Id.* at 22–26. The same exercise produced comparable results when conducted with correctional

staff in the Iowa Department of Corrections. *Id.* at 141–62.

The combination of labeling detainees as part of an "out-group," dehumanizing them, and allowing correctional officers to exercise broad discretion with limited supervision can lead directly to detainee abuse by officers. This combination was especially potent as animosity toward Muslims and Arabs soared immediately after the September 11 terrorist attacks. *See* Kuang Keng Kuek Ser, *Data: Hate Crimes Against Muslims Increased After 9/11*, PRI (September 12, 2016, 2:45 PM) (noting increase in anti-Muslim hate crimes in 2002, from 28 to 481 incidents).

This is precisely the dynamic that took hold at the MDC. Respondents allege that the MDC Petitioners are responsible for the abuses perpetrated against them—not because the MDC Petitioners were supervisors, but because the MDC Petitioners detained Respondents on the basis of race, religion, or national origin and directed, or knew of and failed to prevent, abusive conditions in the institution. *See* Compl. ¶¶ 68–77, 111–18 (alleging Hasty and Sherman approved documentation falsely representing that MDC staff individually assessed detainees prior to confining them in the Administrative Maximum Special Housing Unit (the "ADMAX SHU")—the harshest conditions in the federal prison system—despite knowing they had no ties to terrorism; approved and implemented strip search policy to intimidate and punish detainees; and called detainees "terrorists"); J.A. 231–40, 282–91 (OIG Rep. 118–26, 152–57) (documenting ADMAX SHU conditions); J.A. 72 (OIG Rep. 19) (noting "the BOP did not really know whom [sic] the detainees were"); J.A. 395 (Supp. OIG Rep. 35) (concluding strip searches were "inappropriate").

## II. FEDERAL PRISONS OPERATE ACCORDING TO CLEAR LINES OF AUTHORITY AND REQUIRE NON-DISCRIMINATORY DETENTION PRACTICES

Federal regulations and policies governing the management of BOP facilities require the warden to be intimately involved in the administration of the facility.[3] In particular, a warden is required to play a critical role in both the decision to place a detainee in restrictive confinement[4] and the decision to continue to keep a detainee in restrictive confinement. A warden must implement and follow strict procedures to ensure that detainees are placed in restrictive confinement only under limited and clearly defined circumstances. The regulations are clear that detainees may not be confined on a discriminatory or non-individualized basis.

The conduct alleged in Respondents' Fourth Amended Complaint demonstrates that the MDC Petitioners did not remotely follow the applicable regulations as to conditions of confinement. Specifically, Respondents allege that the MDC Petitioners ordered their placement in the ADMAX SHU without individualized assessments of their dangerousness or risk and owing only to the fact that they were perceived as Muslim or Arab. Respondents also allege that the MDC Petitioners chose to disregard readily available information demonstrating the absence of any ties between

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[3] *Amici* discuss relevant BOP regulations and policies that were in effect at the time of the allegations set forth in the Fourth Amended Complaint.

[4] The term "restrictive confinement" is used herein to describe conditions of confinement that are sometimes referred to as restrictive confinement, solitary confinement, administrative detention, or disciplinary segregation.

Respondents and terrorism and instead confined Respondents in the ADMAX SHU for extended periods of time without regard for due process. If the MDC Petitioners had followed BOP regulations and policies, it is highly unlikely that any of this could have occurred.

### A. Federal Regulations Require Wardens to Play a Critical Role in Placing Detainees in Restrictive Confinement and Strictly Define the Circumstances Under Which Restrictive Confinement Is Permissible

#### 1. BOP Regulations Require Wardens' Involvement in the Placement of Detainees in Restrictive Housing

BOP regulations and policies require the warden's involvement before a detainee can be placed in restrictive confinement. One form of restrictive confinement is termed "administrative detention," defined as "the status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population." 28 C.F.R. § 541.22 (2001).[5] Under 28 C.F.R. § 541.22(a) (2001), the warden may place an inmate in administrative detention when the inmate's

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[5] Immigration detainees are entitled to due-process protection against punishment—greater protection than that afforded to convicted prisoners under the Eighth Amendment, *see Bell v. Wolfish*, 441 U.S. 520, 537 n. 16 (1979); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)—but even policies applicable to post-conviction prisoners forbid the type of treatment alleged in the Fourth Amended Complaint. Because post-conviction regulations are relevant as a minimum floor for all inmates, *amici* discuss regulations that apply to both pre-trial detainees and convicted prisoners.

continued presence in the general population "poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution." A warden who places an inmate in administrative detention on any such basis must prepare an order "detailing the reasons for placing [the] inmate in administrative detention" and must furnish a copy of that order to the inmate within twenty-four hours unless doing so compromises institutional security. 28 C.F.R. § 541.22(b) (2001). And even when permissible, administrative detention may occur "only for short periods of time except where [the detainee requires] long-term protection . . . or where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns." 28 C.F.R. § 541.22(c) (2001). Furthermore, detention must end "when reasons for placement cease to exist." *Id.*

Another form of restrictive confinement is termed "disciplinary segregation." Disciplinary segregation is primarily a punitive measure imposed "when other available dispositions are inadequate to achieve the purpose of punishment and deterrence necessary to regulate an inmate's behavior within acceptable limits." 28 C.F.R. § 541.20(a) (2001).[6] Under federal regulations, a warden may place an inmate in disciplinary segregation only following a hearing in which a

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[6] A warden may also temporarily place an inmate in a more secure cell (which may be an area normally reserved for disciplinary segregation) for up to five days where the inmate causes a serious disruption (threatening life, serious bodily harm, or property) and where the inmate cannot be controlled through administrative detention; or upon the advice of medical staff. 28 C.F.R. § 541.20(b) (2001).

Disciplinary Hearing Officer determines that the inmate has committed certain prohibited acts. *Id.* In such instances, the warden must provide the inmate with advance written notice of the charge(s) against the inmate no fewer than twenty-four hours before the hearing. 28 C.F.R. § 541.17(a) (2001). The period of disciplinary segregation may not exceed sixty days for a single offense. 28 C.F.R. § 541.13 Table 6 (2001).

A warden must also designate a staff member to serve as a Segregation Review Official (the "SRO") to conduct regular reviews of inmates in restrictive confinement. 28 C.F.R. § 541.16(d) (2001). In addition to mandating that the SRO review an inmate's status within seven days of his placement in restrictive confinement, the applicable regulations require the SRO to conduct weekly reviews and hearings every thirty days to assess the inmate's case. 28 C.F.R. §§ 541.20(c), 541.22(c) (2001). *See also* Virginia Hutchinson et al., Nat'l Inst. of Corrections, Inmate Behavior Management: The Key to a Safe and Secure Jail 5 (2009) (noting that "[j]ail policies and procedures must ensure that every inmate is formally reassessed in response to new information and at regularly scheduled intervals").

2. BOP Regulations and Policies Prohibit Segregation of Detainees on Non-Individualized Grounds and Discriminatory Bases

Given that BOP regulations require officials to make an individualized determination before subjecting an inmate to restrictive confinement, wardens may not single out inmates for harsher conditions of confinement except in limited circumstances. *See* 28 C.F.R. §§ 541.20(a), 541.20(b), 541.22(a), 541.22(b)

(2001) (defining disciplinary segregation and administrative detention, respectively, and delineating procedures for placement therein). Moreover, BOP regulations unequivocally prohibit restrictive confinement on racial, religious, and ethnic grounds. 28 C.F.R. § 551.90 (2001) ("[BOP] staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.").

### B. The Complaint and the OIG Report Demonstrate that the MDC Petitioners Did Not Follow BOP Regulations and Policies

Given the conduct alleged in Respondents' Fourth Amended Complaint and the OIG's findings, the MDC Petitioners could not have acted in compliance with the governing regulations. The MDC Petitioners "ordered prolonged placement of [Respondents] and class members in the ADMAX SHU without following the processes they knew the law required for such deprivation." Compl. ¶ 68. By issuing these orders, the MDC Petitioners appear to have systematically ignored exculpatory evidence that supported ending the detainees' restrictive confinement. Instead, the MDC Petitioners denied Respondents the due process required for placement in restrictive confinement, in violation of their superintendent duties.

### 1. The MDC Petitioners Subjected Respondents to Restrictive Confinement Based on Discriminatory and Non-Individualized Determinations in Violation of BOP Regulations and Policies

The MDC Petitioners subjected Respondents to confinement in the ADMAX SHU through the implementation of discriminatory practices that violated the regulations and policies described above.[7] First, the MDC Petitioners ordered their subordinates to ignore the regulations that limit the circumstances under which detainees may be placed in restrictive confinement and that require weekly reviews and formal hearings every thirty days to assess a detainee's status. *Id.* As addressed in the OIG Report, "the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings monthly to assess the detainee's status. Rather, it relied on the FBI's assessment of 'high interest.'" J.A. 230–31 (OIG Rep. 118). Second, the MDC Petitioners confined Respondents and class members to the ADMAX SHU for months beyond the timeframes authorized by federal regulations. Compl. ¶¶ 74, 76. Detainees placed in the ADMAX SHU were also automatically labeled "continue high security" in

[7] The OIG Report notes that "ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal [special housing unit] are usually sufficient for correcting inmate misbehavior and addressing security concerns." J.A. 231 (OIG Rep. 118–19). That the MDC Petitioners oversaw the creation of such a unit and ordered that Respondents and class members be confined there without any legitimate reason to believe that their circumstances even warranted placement in a normal special housing unit highlights their brazen disregard for proper prison procedure.

their monthly restrictive confinement reports, and they were denied any objective review of their placement. *Id.* at ¶ 68; *see also* J.A. 231 (OIG Rep. 118).

The MDC Petitioners must have been aware that placing Respondents in the ADMAX SHU without individualized determinations violated applicable regulations and policies. Certainly, the inference that they were aware is plausible, if not necessary. Thus, by approving documents stating falsely that Respondents were being held there based on "individualized assessment(s) of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration,'" the MDC Petitioners knowingly violated BOP regulations and policies. Compl. ¶ 74. As alleged, no such information was considered by the MDC Petitioners when deciding to place Respondents in the ADMAX SHU. To the contrary, the MDC Petitioners received—but apparently disregarded—frequent written updates demonstrating the absence of evidence linking Respondents to terrorism or indicating that they posed any danger. *Id.* at ¶ 70. Specifically, an MDC intelligence officer prepared and circulated these reports based on comprehensive FBI and INS detainee lists and databases reviewed for the very purpose of keeping the MDC Petitioners informed of any new intelligence on the detainees. *Id.* at ¶ 69.

The Fourth Amended Complaint also sets forth facts evincing violations of BOP regulations prohibiting discriminatory housing of inmates. The MDC Petitioners' disregard of exculpatory information and making of false claims that individual assessments were conducted render all the more plausible Respondents' allegations that they were detained in restrictive conditions on account of being, or being perceived as,

Muslim or Arab, *id.* at ¶¶ 60, 68–74, in violation of BOP regulations. 28 C.F.R. § 551.90 (2001).

There can be no dispute that "a restriction or condition [that] is not reasonably related to a legitimate goal" amounts to "punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. The MDC Petitioners' characterization of all Respondents as "terrorists" without any individualized determinations and the accompanying abuse evinces no legitimate penological objectives; rather, the MDC Petitioners' actions reflect unacceptable discriminatory purposes.

This Court has also long recognized that racial discrimination is "especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). And the Court has repeatedly refused to relax its equal-protection standards in the prison context. *Johnson v. California*, 543 U.S. 499, 510–12 (2005) (holding California's prison inmate racial segregation policy subject to strict scrutiny) ("The right not to be discriminated against based on one's race . . . is not a right that need necessarily be compromised for the sake of proper prison administration."); *Lee v. Washington*, 390 U.S. 333 (1968) (affirming order requiring desegregation of Alabama prisons and jails). If the MDC Petitioners had followed BOP regulations and treated Respondents as "'regular' high-security inmates," J.A. 72 (OIG Rep. 19), then they would have conducted individualized assessments both before and during confinement in the ADMAX SHU. No FBI terrorism designation or BOP order excuses the lack of individual assessments or discriminatory confinement.

## III. BOP FACILITIES OPERATE ACCORDING TO REGULATIONS THAT PROHIBIT ABUSIVE TREATMENT

Federal regulations and policies forbid the physical or verbal abuse of inmates and provide specific procedures under which a warden must address complaints by inmates concerning treatment. Respondents' Fourth Amended Complaint alleges, and the OIG found, that the MDC Petitioners were aware of and condoned abusive physical and verbal treatment of detainees, oversaw inappropriate strip searches, and deliberately ignored numerous complaints lodged by detainees concerning abusive conditions in the ADMAX SHU.

### A. BOP Regulations and Policies Do Not Permit Abusive Treatment Under Any Circumstances

#### 1. Use of Restraints and Force

BOP regulations and policies restrict the conditions under which prison personnel may use force or restraints (including, *inter alia*, handcuffs and four-point restraints) on inmates. Importantly, BOP regulations prohibit prison personnel from applying restraints to inmates confined to an administrative detention cell such as the ADMAX SHU without approval of the warden or his designee. 28 C.F.R. § 552.22(g) (2001). As to the use of force, prison personnel may resort to such methods "only as a last alternative after all other reasonable efforts to resolve a situation have failed." 28 C.F.R. § 552.20 (2001). Under such circumstances, "staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff, and others, to prevent serious property damage and to ensure institution security

and good order." *Id.* Finally, any incident involving the use of force or the application of restraints must be carefully reported and such report must be placed in the inmate's central file. 28 C.F.R. §§ 552.22(j), 552.27 (2001).

2. Prohibitions Against Verbal Abuse

BOP policy strictly forbids verbal abuse against prisoners. *See* BOP Program Statement P.S. 3420.09 (9)(c)(4) (02/05/1999). Specifically, "[a]n employee may not use profane, obscene, or otherwise abusive language when communicating with inmates, fellow employees, or others. Employees shall conduct themselves in a manner which will not be demeaning to inmates, fellow employees, or others." *Id.*

3. Strip Searches of Inmates

Federal regulations clearly define the circumstances under which BOP personnel may conduct body searches of inmates. Among the types of searches that staff may conduct are visual—*i.e.*, strip—searches, which are defined as the "visual inspection of all body surfaces and body cavities." 28 C.F.R. § 552.11(b) (2001). BOP personnel may only conduct a strip search when they have a reasonable belief that an inmate may be concealing contraband, or where an inmate has had a good opportunity for such concealment. 28 C.F.R. § 552.11(b)(1) (2001).

Federal regulations also prescribe the manner in which strip searches are to be performed. Strip searches must be conducted so as to assure an inmate "as much privacy . . . as practicable." *Id.* Moreover, federal regulations require that strip searches be performed by personnel of the same sex as the inmate, "except where . . . delay would mean the likely loss of

contraband." 28 C.F.R. § 552.11(b)(2) (2001). Where staff of the opposite sex perform a strip search, the reasons for doing so must be recorded in the inmate's central file. *Id.*

4. Mandatory Review of Inmates' Complaints

Wardens at BOP facilities are responsible for ensuring that inmates' complaints are satisfactorily resolved. In particular, federal regulations provide that inmates are entitled to formal review of their complaints regarding conditions of confinement—including those concerning abusive treatment—through an administrative remedy program. *See* 28 C.F.R. § 542.10 (2001). Inmates have recourse to the program "if less formal procedures have not resolved the matter."[8] *Id.* Under these regulations, the warden must "[e]stablish procedures for receiving, recording, reviewing, investigating, and responding to Administrative Remedy Requests . . . or Appeals . . . submitted by an inmate," as well as acknowledge receipt of, investigate, and respond to all such requests or appeals. 28 C.F.R. § 542.11(a) (2001). Failure to fulfill these responsibilities is a violation of the warden's duties.

### B. The Abusive Treatment at Issue Could Only Have Occurred with the MDC Petitioners' Knowledge and Failure to Take Measures to Prevent Such Treatment

The allegations in Respondents' Fourth Amended Complaint and the OIG's findings demonstrate that

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[8] Under 28 C.F.R. § 542.13 (2001), an inmate must first seek informal resolution of a complaint from prison staff before lodging a formal Request for Administrative Remedy. The warden is responsible for devising the process by which prison staff may informally resolve complaints.

the MDC Petitioners must have known that they were not in compliance with federal regulations governing the appropriate treatment of inmates because they ordered, approved, and implemented abusive and unlawful detention protocols and conditions that specifically targeted Muslim and Arab detainees. Compl. ¶¶ 60, 75. In addition, the MDC Petitioners ignored detainees' complaints of abuse in dereliction of their duty to properly implement an administrative remedy program. As a result of this failure to follow BOP regulations and policies, Respondents were subjected to unlawful treatment.

Contrary to federal regulations strictly limiting the use of force and restraints against detainees, MDC personnel stated in interviews that "it was appropriate to bend detainees' thumbs, gooseneck their wrists, or use pain compliance methods if the detainees were being noncompliant or combative, although many of them said the detainees never were noncompliant or combative." J.A. 366 (Supp. OIG Rep. 17). In another interview, an MDC official "incorrectly thought that security procedures required officers to step on detainees' leg restraint chains whenever they were stopped or whenever officers needed to remove their leg restraints." J.A. 372 (Supp. OIG Rep. 21). In addition, the Fourth Amended Complaint alleges various instances of the improper use of restraints on detainees, including using restraints "as a form of punishment by leaving [detainees] in a cell in restraints for no proper penological purpose." Compl. ¶ 105.

If the MDC Petitioners were doing their jobs consistent with the applicable regulations and policies, it is highly unlikely that such conduct could have

occurred. Indeed, disregard of BOP policies by correctional officers could only result from a failure on the part of the MDC Petitioners to properly train personnel in BOP policies, or from the MDC Petitioners' failure to enforce BOP policies. Or, even worse, the MDC Petitioners could have instructed personnel to engage in prohibited acts. For example, the OIG details an incident where an individual believed to be a senior MDC official was heard on a videotape stating, "We've got to leave them in restraints and make them behave." J.A. 378 (Supp. OIG Rep. 25).

After numerous complaints of abuse by detainees, the OIG, the BOP Office of Internal Affairs, and the FBI all opened investigations. The BOP also enacted a new policy in early October 2001 to video-tape the detainees whenever they were outside of their cells. Compl. ¶ 107; J.A. 344 (Supp. OIG Rep. 4). The fact that three different government entities found it necessary to launch investigations into allegations of mistreatment, as well as to ensure that any potential interactions between MDC personnel and the detainees in the ADMAX SHU were recorded, strongly corroborates the allegations that the MDC Petitioners failed to properly carry out their duties, as do the OIG's findings.

The MDC Petitioners also contributed to the verbal abuse of Respondents and failed to prevent such abuse after it was brought to their attention. For instance, the MDC Petitioners themselves referred to the detainees as "terrorists" in internal memoranda, and this term, as well as other derogatory names, were adopted by MDC personnel to disparage the detainees. *See* Compl. ¶ 147. As alleged in the Fourth Amended Complaint:

> MDC staff frequently interrupted [Respondents'] and class members' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping, and telling them to "shut the fuck up" while they were trying to pray. Staff also mocked the detainees' prayer by attempting to repeat the Arabic phrases of the Azan (the call to prayer) loudly. One MDC guard frequently yelled "Jesus" whenever he heard the opening phrases of the Azan.

*Id.* at ¶ 136. As psychological studies have found and correctional experts have observed, wardens' actions and characterizations of inmates directly affect correctional officers' treatment of inmates. *See* Bandura et al., *supra*, at 266; Campbell, *supra*, at 26–27; *id.* at 32; Stojkovic & Farkas, *supra*, at 99.

Evidence and complaints of such verbal harassment were brought to the attention of the MDC Petitioners, and yet the verbal abuse persisted (perhaps because the MDC Petitioners themselves used such language). Compl. ¶¶ 110, 137. In fact, even without complaints, it is likely that the MDC Petitioners were aware of the derogatory terms directed at Respondents. The Fourth Amended Complaint alleges that the verbal harassment of the detainees "was so pervasive that one MDC employee estimated that half of the staff at MDC stopped speaking to him after he wrote a confidential memo to the Warden [Hasty] detailing detainees' complaints that was then distributed to the staff members on the ADMAX unit." *Id.* at ¶ 78. As in other instances, however the reported harassment went unpunished. *Id.*

In addition, the OIG found that the MDC Petitioners oversaw an unwritten strip-search policy that violated

the regulations governing such searches. J.A. 393 (Supp. OIG Rep. 34). The OIG found that strip searches were conducted far more frequently than authorized, including when detainees entered the ADMAX SHU, departed the ADMAX SHU, before medical examinations, and after attorney meetings, social visits, and recreation sessions. *Id.* These practices caused detainees to endure strip searches "for no apparent reason, either minutes after they had been thoroughly searched in [Receiving & Discharge ('R&D')] and immediately escorted by officers to the ADMAX SHU, or when they had not even left the ADMAX SHU." J.A. 392 (Supp. OIG Rep. 33). *See also* Compl. ¶¶ 112–13. Detainees were further subjected to strip searches before and after non-contact attorney visits during the course of which they were under constant monitoring, handcuffed, and shackled, and after being directly transferred from one cell to another. Compl. ¶ 112. These strip searches could not have been justified and were in violation of BOP regulations, as the detainees had no opportunity to obtain contraband under the circumstances. Nonetheless, some MDC officials stated that the conduct of these types of illegal strip searches was "standard MDC policy." J.A. 394 (Supp. OIG Rep. 34).

As a result of the BOP policy requiring that detainees be videotaped whenever they were outside of their cells, MDC staff, acting under the MDC Petitioners' instructions, filmed many strip searches in their entirety. J.A. 392 (Supp. OIG Rep. 33); Compl. ¶ 116. Such practices violated the regulations requiring that prison personnel perform strip searches "in a manner designed to assure as much privacy to the inmate as practicable." Compl. ¶ 116. There can be no dispute that the MDC Petitioners were aware of these practices because MDC staff maintained a "visual

search log" for MDC administration to review. *Id.* at ¶ 114. Consequently, the MDC Petitioners knew that detainees faced unlawful, invasive strip searches but failed to take remedial action.

It is highly unlikely that these arbitrary strip searches were the result of a few malfeasant MDC officers; rather, MDC personnel carried out the videotaped strip searches under orders from the MDC Petitioners. Given the allegations contained in the Fourth Amended Complaint, coupled with the OIG's findings, there can only be one logical conclusion: the MDC Petitioners either actively directed, or failed to prevent, the conduct alleged. Either way, the MDC Petitioners were grossly derelict in their duties.

## IV. THE MDC PETITIONERS' ARGUMENT THAT THEY WERE PERMITTED TO VIOLATE APPLICABLE REGULATIONS AND POLICIES BASED ON FBI TERRORISM DESIGNATIONS AND BOP ORDERS IS BASELESS

The MDC Petitioners contend that they cannot be held liable for the alleged unlawful conditions of confinement because they were following FBI terrorism designations and BOP policy. Hasty & Sherman Br. 32–36, 40. BOP wardens, however, are under no obligation to follow assessments from a different agency component like the FBI that has no command authority over them. And to the extent that BOP Headquarters instructed MDC officials to restrictively confine detainees, wardens are not obligated to perform acts that violate the law or contradict longstanding BOP regulations and policies—such as imposing solitary confinement based on a blanket "designation," rather than conducting individualized determinations. Further-

more, detainees are entitled to certain minimum confinement conditions, which do not permit physical or verbal abuse, regardless of what "orders" might be given—not that it appears the MDC Petitioners claim they were following orders with respect to the abuse of detainees. Finally, as a matter of law, when wardens act outside the law and violate BOP regulations, claims that they were just "following orders" do not immunize them from liability for their wrongful conduct. *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979), cert. denied, *Mitchell v. Forsyth*, 453 U.S. 913 (1981).

### A. Wardens Are Not Required to Follow FBI Designations Because—as BOP Employees—They Are Not Within the FBI's Chain of Command; Nor Are They Required to Follow BOP Instructions on Restrictive Confinement That Violate BOP Regulations and Policies

As officials within the BOP—a DOJ component separate from, but not subordinate to, the FBI—wardens are not required to follow FBI "orders" concerning confinement conditions. The BOP and the FBI are coequal "principal organizational units" within the DOJ. 28 C.F.R. § 0.1 (2001); OIG Rep. App. C (DOJ organizational chart).[9] The BOP director serves directly under the Attorney General, 18 U.S.C. § 4041 (2000), not the FBI director. In addition, the BOP, not the FBI, is charged with managing and regulating all federal penal and correctional institutions. 18 U.S.C. § 4042(a)(1) (2000); 28 C.F.R. § 0.95(a) (2001). And it is the BOP,

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[9] The OIG Report appendices are not included as part of the Joint Appendix, but are available at https://oig.justice.gov/special/0306/full.pdf.

not the FBI, that is tasked with housing, protecting, and caring for inmates, 18 U.S.C. § 4042(a)(2), (3) (2000), as well as the "[c]lassification, commitment, control, or treatment of persons committed to the custody of the Attorney General." 28 C.F.R. § 0.95(d) (2001).

Thus, the FBI had no authority to oversee—or command—MDC officials, including wardens Hasty and Sherman in any fashion. The FBI can do no more than provide "recommendations" to the BOP, which itself, in turn, issues directives to wardens. Relying on the FBI's terrorism designations, the BOP decided to "treat the September 11 detainees as high-security detainees," J.A. 72 (OIG Rep. 19), despite the fact that "BOP did not really know whom [sic] the detainees were." *Id.*

But even if the FBI or the BOP had the authority to instruct MDC officials to disregard applicable laws and regulations, no one actually directed the MDC Petitioners to treat Respondents differently than high-security detainees are typically treated. *See supra* II.B. The MDC Petitioners, therefore, were still required to comply with BOP regulations and policies and make individualized determinations concerning whether to implement restrictive confinement conditions, rather than confining detainees simply on the basis of their being, or being perceived as, Muslim or Arab.

### B. The Harms Alleged by Respondents Were the Result of Direct Involvement by the MDC Petitioners, Which Exceeded Any "Orders" From the FBI and the BOP

The MDC Petitioners contend that they were merely following policies and orders issued by superiors,

Hasty & Sherman Br. at 32, but that misconstrues the facts alleged in the Fourth Amended Complaint. Respondents allege that the MDC Petitioners took an active role in designing and implementing abusive and unlawful detention conditions at the MDC, Compl. ¶ 75, and that the MDC Petitioners were deliberately indifferent to abuses perpetrated by frontline officers. *Id.* at ¶¶ 24, 26, 77–78.

Respondents allege several instances in which the MDC Petitioners went above and beyond any order in numerous ways, creating conditions of confinement that were unlawful, against BOP regulations and policies, and contrary to correctional "best practices," thus supporting the inference of punitive intent. *See Wolfish*, 441 U.S. at 539 n.20 (noting that while "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution" such conditions would "support a conclusion that the purpose for which they were imposed was to punish").

First, the BOP did not order the MDC Petitioners to video- and audio-record detainee conversations with their attorneys. Nevertheless, when detainees finally secured legal representation, the MDC Petitioners instituted a policy of audiotaping those conversations and disregarded MDC staff's alternative "silent witness" camera proposals. Compl. ¶¶ 98–99.

Second, the BOP did not order the MDC Petitioners to strip-search the detainees in a manner contrary to law and BOP policy. But the MDC Petitioners nevertheless approved and implemented a strip-search policy that "inappropriately used strip searches to intimidate and punish detainees," J.A. 395(Supp. OIG Rep. 35), and violated BOP policy. J.A. 392–93 (Supp. OIG Rep. 33–34). *See supra* III.B.

Finally, the BOP did not order the MDC Petitioners to harass the detainees. But Petitioner Hasty called the detainees "terrorists" in various memoranda. Compl. ¶ 109. Such epithets, combined with Petitioner Hasty's deliberate failure to make rounds in the ADMAX SHU—contrary to BOP regulations and policies and correctional "best practices"—or otherwise supervise frontline officers, led directly to officers' verbal and psychological harassment of detainees. *Id.* at ¶¶ 109, 120–21, 136–37. *See supra* III.B.

As the Second Circuit found, the OIG Report supports Respondents' allegations concerning the design and implementation of the confinement conditions because, "while the decision to impose highly restrictive conditions was made at BOP headquarters . . . MDC officials created the particular conditions imposed." *Turkmen v. Hasty*, 789 F.3d 218, 247 (2d Cir. 2015) (citing OIG Rep. 19, 124–25). The order to hold the detainees in "the highest level of restrictive detention," *id.* at 248, does not justify the detention *conditions* that the MDC Petitioners designed and implemented.

### C. Wardens Are Not Required to Follow Orders Requiring the Violation of BOP Regulations and Policies That Safeguard Detainees' Safety

Wardens may not escape liability simply because they complied with superiors' orders if those orders violate clearly established law and BOP regulations and policies. The MDC Petitioners contend that they should not liable for the confinement and treatment of detainees because they could not "disregard" FBI designations, and that such insubordination would upend the "proper functioning of law enforcement." Hasty & Sherman Br. at 32. But the Constitution,

BOP regulations and policies, and effective correctional practices give no quarter to the notion that obeisance to unlawful orders should immunize correctional officials from liability.

The "following-orders" defense plainly does not stretch to immunize the MDC Petitioners here. Simply put, a correctional officer's "[r]eliance on a superior's orders does not in itself dissipate all liability." *Thaddeus-X v. Blatter*, 175 F.3d 378, 393 (6th Cir. 1999) (en banc). As circuit courts have held in the law-enforcement and correctional context, "if [officials] knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty." *Forsyth*, 599 F.2d at 1217 (rejecting FBI agent's following orders argument). *See also Raysor v. Port Auth. of N.Y. & N.J.*, 768 F.2d 34, 38 (2d Cir. 1985) (citing Restatement (Second) of Agency § 343 comments b, d (1958)) (holding police officer who followed sergeant's orders could be found liable under 42 U.S.C. § 1983 for false arrest because of "the general tort rule that an agent is not relieved of liability merely because he acted at the command of the principal"). Where correctional officers have similarly contested their liability because they lacked authority to alter maximum-security classifications, lower courts have held that liability may be premised on the officers' failure to remedy a jail inmate's conditions of confinement that they knew to be punitive. *Villanueva v. George*, 659 F.2d 851, 854-55 (8th Cir. 1981) (en banc).

Other petitioners recognize that the purported chain of command is not inviolate. Petitioner James Ziglar "acknowledged that at some point he should have 'gone around the chain of command' directly to the Attorney General or the Deputy Attorney General" to

voice "INS's concerns about the ramifications caused by the slow pace of the detainee clearance process." J.A. 146–47 (OIG Rep. 67).[10]

The MDC Petitioners cannot escape liability based on their argument that they were just following orders. Respondents detail sufficient facts demonstrating that the MDC Petitioners were aware that the assignment of detainees to restrictive confinement was impermissibly based on the detainees' race, religion, or national origin, was carried out without any individual assessment, Compl. ¶¶ 68–74; *Lee*, 390 U.S. 333, and lacked legitimate penological purpose. Compl. ¶¶ 68–76; *Wolfish*, 441 U.S. at 539. Moreover, BOP regulations and policies proscribing such actions, *see supra* II.A, III.A, made them "fully aware of the wrongful character of their conduct." *See Hope v. Pelzer*, 536 U.S. 730, 744 (2002).

The "following-orders" defense is not justifiable as a matter of effective correctional management either. "Correctional managers and supervisors are tempted to deny responsibility because the jobs are hard, the decisions tough, and the consequences difficult. Moreover, managers and supervisors may receive harmful or questionable directives, yet feel an obligation to follow rules and orders." Campbell, *supra*, at 34. But blind allegiance to questionable orders "reduces the manager or supervisor to a machine with no discretion or judgment." *Id.* at 35. Contrary to the

[10] Reporting up the chain of command also rarely occurred. The OIG reported that the New York FBI and INS "failed to keep FBI and INS Headquarters informed of all aliens who would be subject to the clearance investigation requirement," attributing the lack of oversight to the New York offices' "long history of taking actions independent of direction from their Washington, D.C., headquarters." J.A. 124 (OIG Rep. 54).

MDC Petitioners' argument, it is, instead, immunization of correctional officials who follow unlawful orders and fail to remedy punitive conditions of confinement that would undermine the proper functioning of jails and prisons.

## CONCLUSION

The Court should affirm the judgment of the court of appeals in favor of Respondents.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

**(Caption continued on inside cover)**

**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICI CURIAE* IMMIGRATION DETENTION ADVOCACY ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

No. 15-1363

DENNIS HASTY and JAMES SHERMAN,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

## QUESTIONS PRESENTED

1. Whether this action, seeking damages from federal officials for violating the constitutional rights to due process of law and equal protection of the laws of persons detained in a federal correctional facility, presents a novel context for the remedy authorized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the detailed factual allegations in this case, which are supported by a Department of Justice Report and specifically exclude the "obvious alternative explanation" that was dispositive in *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009), state a claim under Federal Rule of Civil Procedure 12(b)(6).

3. Whether selecting certain non-citizens for solitary confinement and other punitive treatment based solely on their race, religion, ethnicity, or national origin, without any basis to suspect a connection to terrorism, violated these individuals' clearly established constitutional rights to due process of law and equal protection of the laws.

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## INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae, listed in the appendix to this brief, are non-profit organizations which advocate for the due process rights of immigrants who are detained by the Department of Homeland Security (DHS) pending the completion of administrative removal proceedings or, for some, pending removal from the country. Amici advocate for and provide services to countless detained immigrants in facilities throughout the country. Amici have a deep interest in protecting detained immigrants from unduly harsh, punitive, and dangerously substandard conditions of confinement, and in ensuring that detained immigrants have avenues of redress, including the *Bivens* remedy, when they have suffered abuses in detention that violate the U.S. Constitution.

Amici include 22 Immigration Detention Advocacy Organizations, including Human Rights Watch, the National Immigrant Justice Center, and the Southern Poverty Law Center. Amici's statements of interest are appended to the brief.

## SUMMARY OF ARGUMENT

Each day, approximately 33,000 immigrants are detained by the Department of Homeland Security at over 200 detention facilities across the country,

totaling more than 400,000 detainees each year. Although this detention is civil—pending the completion of administrative removal proceedings or pending removal from the country—the conditions of confinement essentially resemble criminal incarceration. DHS detains immigrants in prison-like conditions, complete with jumpsuits, headcounts, restricted movement inside the facility, and limited family visitation.

Immigration detention, which has vastly expanded in the last two decades, is plagued by widespread abuses. Detained immigrants have been subjected to medical and mental health failures, sexual assault, punitive use of solitary confinement, and dangerously unsanitary conditions. DHS maintains no binding regulations for immigration detention facilities and regularly approves the continued use of facilities where egregious abuses occur, without implementing significant or sometimes any reforms. DHS has shown a callous disregard for correcting widespread, serious abuses in detention facilities across the country.

Given the sustained reliance on detention for immigration enforcement, there are no signs that abuses will abate in the future. Yet the petitioners argue, inter alia, that *Bivens* claims of unconstitutional conditions of confinement must fail. They argue that respondents' treatment in immigration detention amounted to a "new context" because their detention, immediately following the 9/11 tragedy, implicated matters of national security, potentially sensitive intelligence information, and immigration policy. By arguing that immigration policy, which authorizes immigration detention,

should per se foreclose *Bivens* claims, the petitioners would close federal courts to all immigrant detainees with claims of unconstitutional treatment during their detention.

Preserving a *Bivens* remedy for claims of unconstitutional treatment arising out of immigration detention is critical for two reasons. First, DHS officials have approved a system of confinement with minimal safeguards for detainees' physical well-being and constitutional rights, as well as ineffective oversight. Second, DHS's systemic disregard of egregious detention conditions has resulted in constitutional abuses in what should be non-punitive civil detention. Preserving the *Bivens* remedy is thus important to promoting accountability and serving as a backstop against constitutional violations in the immigration detention context.

## ARGUMENT

### I. CONGRESS AND DHS HAVE EXPANDED IMMIGRATION DETENTION WITH LITTLE ATTENTION TO CURBING WIDESPREAD ABUSES

Immigration detention, as the government has itself stated, is civil administrative detention that is not intended to be punitive. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); Dora Schriro, *Immigration Detention Overview and Recommendations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, at 2 (2009), https://goo.gl/od3E2x. Detention is for the purposes of assuring the immigrant's appearance at removal proceedings or at removal, and to prevent any danger to the community. Nevertheless, immigration detention occurs in county jails or in facilities that look and function like jails, from high

walls with razor wire to jumpsuits.

Immigration detention has expanded dramatically in the last three decades and now ensnares over 400,000 people each year. Approximately two-thirds of detained immigrants are awaiting completion of lengthy removal proceedings, with one-third awaiting execution of their removal orders. ACLU, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons* (2016), https://goo.gl/uEEJbH. The law mandates detention for immigrants with certain prior criminal convictions, immigrants with final removal orders, and those seeking admission at the border. For the remainder, including some long-term residents and asylum seekers in removal proceedings, detention is not mandatory and is purportedly based on individualized flight risk and danger considerations. However, from 2009 on, Congress has, in fact, eschewed individualized decisions by requiring that DHS detain a minimum of approximately 33,000 people each day.

Immigration detention facilities are largely privatized, lack binding regulations, and are poorly overseen. U.S. Immigration and Customs Enforcement (ICE), the arm of DHS that oversees detention, relies heavily on facilities run by private contractors and state and local entities. Steven Nelson, *Private Prison Companies, Punched in the Gut, Will Keep Most Federal Business*, U.S. NEWS & WORLD REPORT (Aug. 18, 2016), https://goo.gl/sBkl3O. To regulate these facilities, ICE imposes non-binding standards that are more suited to prisons and jails than to civil immigration detention, which should be less restrictive and non-punitive. ACLU, *Shutting*

*Down the Profiteers*, at 8–9. ICE's system of monitoring compliance with these standards is also weak and ineffective, and fails to ensure safe, humane conditions of confinement.

As a result, the story of immigration detention is one of widespread abuses ranging from fatal medical neglect, to punitive overuse of solitary confinement, to sexual abuse and unsanitary conditions. Harsh and punitive detention conditions not only lead to deterioration in medical and mental health, but also discourage immigrants from pursuing their applications for relief from removal by reducing their chances of obtaining counsel and adequately preparing their cases. Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGRATION COUNCIL, at 5 (2016), https://goo.gl/lUlhM8. ICE officials know of these abuses and condone them by taking few if any corrective measures, and ICE's system of non-binding standards and minimal oversight has proven largely ineffective at preventing abuses.

Given the widespread abuses in immigration detention, and the callous disregard of ICE officials, maintaining the *Bivens* remedy as a mechanism of redress for detained immigrants is critical. The abuses faced by respondents in this case may have occurred because of targeting based on their actual or perceived religion or ethnicity, but similarly serious abuses in immigration detention continue to be widespread. The *Bivens* remedy should be preserved because it is an important mechanism to promote accountability and deter future abuses in immigration detention.

### A. Immigration Detention Has Expanded Dramatically

The number of detained immigrants has grown drastically in the last three decades. In 1985, the average daily population was less than 5,000; by 2015, it had grown to almost 35,000. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1466 (2015). As a result of changes in the 1996 immigration law, the average daily population grew from less than 10,000 to almost 20,000 by 2001. ACLU, *Shutting Down the Profiteers*, at 7. As a result of policies favoring detention post-9/11, the average daily population climbed again, reaching over 30,000 by 2008. *Id.* In 2009, Congress for the first time established a minimum daily detention requirement of "not less than" 33,400 people. National Immigrant Justice Center, *Immigration Detention Bed Quota Timeline*, at 3–4 (2016), https://goo.gl/3VC0u0. In subsequent years, Congress continued to impose a similar minimum detention bed quota, and ICE detention has typically remained well above 30,000. *Id.*

In general, ICE detains three categories of adult immigrants: those with pending administrative removal proceedings, those seeking admission at the border, and those with pending removal orders. The first group, immigrants with pending administrative removal (or deportation) proceedings, includes people who are applying for asylum, withholding of removal, cancellation of removal, and other types of relief from removal. They may ultimately win their cases and never be removed. Except for a sub-group of immigrants with certain criminal convictions whose

detention pending removal proceedings is mandated by statute, 8 U.S.C. § 1226(c), the remainder of this group is subject to discretionary detention. *Id.* § 1226(a). Their detention is authorized only if they pose a significant flight risk or danger to the community. *Id.*; 8 C.F.R. 1236.1.

The second group includes people seeking admission at the border but lacking documents for lawful admission. 8 U.S.C. § 1225(b). These immigrants must be detained until they are removed through summary "expedited removal" procedures or until they are found to have credible fear and referred to removal proceedings where they may apply for asylum or withholding of removal, at which point their detention is no longer mandatory. It also includes certain legal permanent residents who are treated as if they are seeking admission. *Id.* § 1101(a)(13)(C). The third group, immigrants who have removal orders that will be executed, includes people who lost their cases in removal proceedings. *Id.* § 1231(a). It also includes recent entrants at the border who are ordered removed at the border after summary "expedited removal" procedures, *id.* § 1225(b)(i)(B)(iii)(IV), and immigrants for whom ICE has reinstated a prior removal order after they re-entered. *Id.* § 1231(a)(5).

Included in ICE detention are children detained with their parents. Starting in 2014, DHS sharply increased the detention of families with children, including babies and toddlers. This year, DHS is filling over 3,000 family detention beds. ACLU,

*Shutting Down the Profiteers*, at 22–23.[2]

ICE detains immigrants in several types of secure, facilities. According to a recent DHS review, federally owned and directed facilities house 10% of all detained immigrants. Homeland Security Advisory Council, *Report of the Subcommittee on Privatized Immigration Detention Facilities*, at 5 (Dec. 1, 2016), https://goo.gl/hHVPWe ("HSAC Report"). Private, for-profit prison contractors hold approximately 65% of all detained immigrants. *Id.* at 6. These include detention facilities owned and operated by private prison companies such as the Corrections Corporation of America (CCA) and the GEO Group (GEO).[3] County jails and similar facilities operated by state and local governments and secure facilities contracted through the U.S. Marshals Service hold the remaining 25% of detained immigrants. *Id.*

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[2] Another agency, the Office of Refugee Resettlement, within the Department of Health and Human Services, holds immigrant children who are unaccompanied by adult guardians at the time of their apprehension in shelters, and secure and therapeutic facilities. Olga Byrne and Elise Miller, *The Flow of Unaccompanied Children through the Immigration System* VERA INSTITUTE OF JUSTICE (2012), https://goo.gl/jqQs4a.

[3] On October 28, 2016, CCA announced that it had rebranded its name to CoreCIVIC. Bethany Davis, *Corrections Corporation of America Rebrands as CoreCIVIC* (Oct. 28, 2016), https://goo.gl/JUFfZT. For the sake of clarity, the brief refers to the company as CCA.

### B. Detention Adversely Affects Immigrants and Includes Those Who Pose Little or No Risk

The adverse effects of detention are well-established. Detention inhibits immigrants from finding counsel, communicating with counsel, and preparing and winning their cases. Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*, at 4 (2016), https://goo.gl/mGxXWQ. Detention also causes deterioration in detainees' physical and mental health. *Id.* at 31–32. Detention puts financial and emotional strain on detainees' families, including U.S. citizen family members. *Id.* at 31. When detention conditions are unduly harsh or constitutionally deficient, these harms multiply.

DHS's immigration detention contracts, which now cost U.S. taxpayers over $2 billion dollars each year, promote over-detention. William Selway and Margaret Newkirk, *Congress's Illegal-Immigration Detention Quota Costs $2 Billion a Year*, BLOOMBERG BUSINESSWEEK (September 26, 2013), https://goo.gl/Cc89sD. In many contracts, ICE guarantees payment for a certain number of detention beds to a contractor whether or not those beds are occupied. Detention Watch Network *et al.*, *Banking on Detention: Local Lockup Quotas and the Immigrant Dragnet* (2015), https://goo.gl/BDlRsc. ICE then fills those beds—regardless of whether individuals pose risk of flight or danger—so as to avoid payment without any services received. *Id.*; *see also*, Detention Watch Network *et al.*, *Banking on Detention: 2016 Update* (2016), https://goo.gl/Vu4Qih.

Immigration detention includes those who pose little or no public safety risk. First, ICE's latest figures show that approximately 20,000 individuals in detention each day have no prior criminal convictions, compared to 15,000 who do. *See ICE Weekly Departures and Detentions Report*, at 6 (2016), https://goo.gl/wY7YQ3. Second, the vast majority of those with prior criminal convictions were convicted of low-level crimes. *See* Transaction Records Access Clearinghouse, *Secure Communities and ICE Deportation: A Failed Program?* (Apr. 8, 2014), https://goo.gl/lRW43a.

Third, ICE detains more asylum seekers than it previously did, even though research shows they typically pose very little danger or flight risk, and respond well to community-based supervision. ACLU, *Shutting Down the Profiteers*, at 19-20, 21–22. The number and percent of asylum-seekers held in immigration detention has increased from 15,683 in FY 2010 (or 45 percent of all asylum-seekers in removal proceedings) to 44,228 in FY 2014 (or 77 percent). *Lifeline on Lockdown*, at 2.

### C. DHS's Callous Disregard of Abuses is Evidenced by Lax and Ineffective Oversight

ICE has the ultimate responsibility to ensure that detention conditions meet minimum constitutional requirements. *HSAC Report*, at 6. ICE has failed in this important duty at every stage of the process, from setting the minimum standards of confinement, to ensuring that facilities comply with those standards, to providing oversight to correct systemic failures that impact all detention facilities.

First, ICE has failed to adopt the appropriate minimum standards for immigration detention. In 2000, ICE developed written detention standards applicable to all immigration detention facilities, which ICE later revised and strengthened in 2008 and again in 2011. In 2012, the American Bar Association noted that ICE's standards are more suited to correctional facilities than to civil detention. American Bar Association, *ABA Civil Immigration Detention Standards*, at 3–5 (2012), https://goo.gl/uLoIpH. The ABA noted that restrictions on the liberty of immigrants imposed to assure their appearance at proceedings or at removal should be the "least restrictive, non-punitive means necessary to further these goals." *Id.* at 4. The ABA recommended placing immigrants in secure "residential" settings, not jails, with full access to counsel, medical and psycho-social care, their own clothes, and freedom of movement within the facility, among other privileges not typically found in correctional facilities. *Id.* at 4–5. ICE's 2011 Performance Based National Detention Standards ("PBNDS 2011") do not provide these basic protections. *See* Performance-Based National Detention Standards 2011, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://goo.gl/EmkhLB.

Second, DHS has doggedly refused to make ICE Detention Standards into binding regulations, despite repeated requests for rulemaking by advocates. *See, e.g.*, National Immigration Project of the National Lawyers Guild *et al.*, *Petition to Initiate Rule-making* (Jan. 24, 2007), https://goo.gl/ORo60c; National Immigrant Justice Center, *Ensuring Fairness and Justice in Detention Centers: Codifying*

*and Independent Monitoring are Critical Components* (2009), https://goo.gl/oOJ3vX.

Third, ICE has even failed to require all detention facility operators to comply with the most current, and most protective, 2011 version of the Detention Standards. As of 2016, the older 2000 and 2008 versions of the Detention Standards were still used in facilities that house 10% and 15%, respectively, of the detained population. National Immigrant Justice Center, *ICE's Failed Monitoring of Immigration Detention Contracts* (2016), https://goo.gl/7daoDC. The patchwork of non-binding standards sows confusion and breeds inconsistency.

Fourth, ICE disregards evidence of widespread abuses and approves facilities for continued use each year, without requiring reforms. Each year, ICE makes a one-time inspection of facilities that hold 50 or more immigrants, reviewing their compliance with the detention standards. *Id.* at 2. In addition, ICE conducts sporadic inspections as needed at facilities that hold 50 or more immigrants to check on compliance with key standards where the facility has previously had problems. *Id.* ICE also performs less frequent reviews of facilities that hold less than 50 people and facilities that hold detainees for less than 72 hours. *Id.*

The inspections are designed to avoid accountability. They are announced in advance, allowing facilities ample time to hide substandard conditions. *Id.* They are conducted through checklist-based instruments by inspectors who engage in perfunctory reviews to "track whether or not policies exist rather than inquire into their

implementation or effectiveness." The Immigration Detention Transparency and Human Rights Project, *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse*, at 2, 13 (2015), https://goo.gl/1AANqY. The reviews do not invite or allow qualitative data collection. *Id.* They do not require detainee interviews. *Id.* And, most importantly, they do not impose meaningful consequences for failures. *Id.*

ICE's inspections have failed to produce greater systemic compliance with the Detention Standards, or safe and humane conditions of confinement. In 2009, a report reviewing years of ICE inspection reports concluded that inspections had not produced greater compliance. National Immigration Law Center *et al.*, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers*, at 7–8 (2009), https://goo.gl/kLJ4jT. In 2015, the U.S. Commission on Civil Rights noted after a robust review of detention facilities that, "[e]vidence suggests that DHS is not fully implementing select portions of the standards to the detriment of immigrant detainees." U.S. Commission on Civil Rights, *With Liberty And Justice For All: The State Of Civil Rights At Immigration Detention Facilities*, at 28 (2015), https://goo.gl/Zz8hWg. "[B]ecause these standards do not have enforcement mechanisms, facilities are not held accountable when they fail to maintain or meet th[o]se standards—at times with tragic results." *Id.* at 25. Year after year, DHS disregards credible, mounting evidence of systemic abuses in detention.

## II. Non-Citizens In Immigration Detention Continue To Face Unlawful Abuse And Deprivations

The result of all the foregoing is this: *People suffer in immigration detention.* They have serious medical problems that go ignored. They are beaten by guards. They are put in solitary confinement for weeks for arbitrary reasons, as retaliation for complaining, or because they are LGBTQ. They are raped. They include very young children who are sick and afraid because they do not know how long they will remain imprisoned. They are served spoiled food or foul-smelling water, and they get infections from unsanitary cells. Reports of serious suffering emerge regularly from every detention center across the country, every year, described in patterns that are disturbingly regular.

### A. Medical Neglect

165 people have died in ICE custody since October 2003. Immigration and Customs Enforcement, *List of Deaths in ICE Custody* (Oct. 31, 2016), https://goo.gl/fvJdMc. The average age at death is 44. *Id.* Most of those people died because of medical conditions; many of those deaths could have been prevented by timely and appropriate care. *See* ACLU *et al.*, *Fatal Neglect: How ICE Ignores Deaths in Detention*, at 7–21 (2016), https://goo.gl/ERwJR4 (describing 8 preventable deaths).

A few examples illustrate the point. Pablo Gracida-Conte died of heart failure in Arizona's Eloy Detention Center despite showing serious symptoms for almost a month. *Id.* at 10–12. In early October 2011, Gracida-Conte complained of a 10 out of 10

pain level, burning abdominal pain, and daily vomiting; medical staff ordered tests and recommended a blander diet. *Id.* at 11. He reported the same symptoms a week later, but was not referred to a doctor. *Id.* A week after that, he complained of shortness of breath, increased level of pain during meals, and difficulty sleeping. *Id.* Two days later, a nurse found that he had an irregular heart rate, rapid respiratory rate, low blood pressure, and a weight gain of five pounds in six days; he was not referred to higher-level care until the next day, when he could not complete a sentence without stopping to breathe. *Id.* He died three days after finally being referred to a hospital. *Id.* A doctor who reviewed Mr. Gracida-Conte's case concluded that his "death might have been prevented if the providers, including the physician at [Eloy], had provided the appropriate medical treatment in a timely manner." *Id.* at 12.

Juan Carlos Baires was a 26-year-old HIV-positive man who died from an untreated staph infection he developed in the Lerdo Detention Facility in Bakersfield, California. Third Am. Compl. at 2, *Baires v. United States*, No. 09-cv-5171 CRB (N.D. Cal. Aug. 8, 2011), ECF No.122 ("Third Am. Compl."). Baires told Lerdo staff that he was HIV-positive upon his arrival, and he told a Lerdo doctor the next day. *Baires v. United States*, No. 09-cv-5171 CRB, 2010 WL 3515749, at *3 (N.D. Cal. Sept. 8, 2010). He had been taking HIV medication, but was denied HIV medication at Lerdo. *Id* at *2–*3. By the next week, he had developed a painful foot infection that caused him to drag his foot behind him as he walked. *Id.* at *3. Instead of prescribing Baires any HIV medication

or antibiotics, the Lerdo doctor gave him Tylenol and sent him on his way. Third Am. Compl. at 21. The following week, when the Lerdo doctor diagnosed Baires' swollen ankle as a possible bone infection, he gave Baires crutches but did not order tests or prescribe antibiotics. *Id.* at 23. The facility then skipped his immunology appointment required to approve his HIV medication. *Id.* at 24. Baires was taken to the emergency room on November 11, 2008, 23 days after he was admitted to Lerdo and his HIV medications were cut off, when medical staff became alarmed by his high pulse and low blood pressure. *Id.* at 25. He was diagnosed with a staph infection, pneumonia, and kidney failure; doctors performed surgery on his lower leg. *Id.* at 25–26. He was in critical condition at the time of surgery, and died of cardiorespiratory arrest on November 12. *Baires*, 2010 WL 3515749, at *3. A district court, later commenting on Lerdo's "horrifically inadequate medical care," stated: "At this point, there is no real dispute that [Baires'] allegation[s are] true; the question instead is who can be held responsible." *Baires v. United States*, No. 09-cv-05171 CRB, 2011 WL 6140998, at *1 (N.D. Cal. Dec. 9, 2011).

Santiago Sierra-Sanchez was a 38-year-old man who died in 2014 from a staph infection that went untreated in the Utah County Jail. Human Rights Watch, *Deaths in Immigration Detention* (July 7, 2016), https://goo.gl/eUcIX8. Sierra-Sanchez told jail staff upon his arrival that he had terrible back pain; he needed help standing up and sitting down, and was wheeled around in an office chair or a wheelchair. Office of Detention Oversight, *Detainee Death Review: Santiago Sierra Sanchez*, at 3–4 (2014),

https://goo.gl/Cr3Gjo. Medical staff did not take his temperature at intake, or several hours later when a nurse found that he had an "elevated pulse and borderline high blood pressure." *Id.* at 7. The jail's nurse suspected Sierra-Sanchez "might be playing games to get narcotic pain medication" and did not follow standard protocols regarding back pain, which included consulting a provider. *Id.* He also told the nurse he was spitting blood, but he was not believed. *Id* at 8. Although he was placed on 15-minute watch that night, only three 15-minute checks were done. *Id.* Video surveillance also showed that when the officer actually did walk past Sierra-Sanchez's cell, he often did not look at Sierra-Sanchez. *Id.* at 8–9. He was discovered in the middle of the night face down in a pool of bloody vomit, and died later that morning of a staph infection that resulted in severe pneumonia. *Id.* at 10, 12. Medical experts who reviewed Sierra-Sanchez's death concluded that the jail's neglect contributed to his death. *Deaths in Immigration Detention.* "Medical staff essentially abandoned this patient by not properly assessing him or following up," remarked one expert. *Id.*

Irene Bamenga died while detained in the Albany County Correctional Facility (ACCF) in New York. *Zikianda v. Cty. of Albany*, No. 1:12-cv-1194, 2015 WL 5510956, at *2 (N.D.N.Y. Sept. 15, 2015). Bamenga suffered from chronic congestive heart failure, a condition which weakened her heart, but which she had been successfully treating with a medication regimen. Compl. at 9–11, *Zikianda v. Cty. of Albany*, No. 1:12-cv-1194 (N.D.N.Y. July 26, 2012), ECF No. 1. She told ICE officials about her health condition and provided them with her

medication, but she was not allowed to take her medication for three days. *Id.* at 11–12. Instead, a nurse practitioner at the Allegany County Jail provided her with only some of her medication without consulting a doctor. *Id.* at 12. When Bamenga was transferred to ACCF a week later, along with her prescribed medications, the facility's doctor provided her with different medications without consulting her treating physician. *Id.* at 14–15. She told medical staff in writing that she was having shortness of breath and dizziness, and that she was not taking the right medication. *Id.* at 16. Eleven days after she was detained, she received a full medical assessment; she was found dead in her cell the next day. *Id.* at 16–17.

One theme in particular emerges: For whatever reason, detainees are often told to "drink more water" in lieu of medical treatment, even for serious conditions. A detainee at the Berks County Residential Center in Pennsylvania, for example, said that her six-year-old daughter had to be hospitalized because of a fever; the doctor prescribed acetaminophen to manage it. Human Rights First, *Family Detention in Berks County, Pennsylvania,* at 8 (2015), https://goo.gl/LLXHUx. When they returned to Berks, the facility's medical staff refused to fill the acetaminophen prescription, saying they had done their own assessment, and that the child should simply "drink more water."

An eight-year-old boy recently released from the Karnes County Residential Center in Texas had to be hospitalized for pneumonia and a 105-degree fever just an hour after leaving the facility. Michael Barajas, *Texas May Call Them Childcare Centers,*

*Critics Say They're Prisons*, HOUSTON PRESS (Nov. 25, 2015), https://goo.gl/OS4o1d. The mother said she begged Karnes staff for medical attention for days, but they simply told her to make him drink more water. *Id.*

Indeed, reports of medical staff simply telling detainees to "drink more water" are disturbingly common to different facilities all across the country. *See* Megan Jula and Daniel Gonzalez, *Eloy Detention Center: Why So Many Suicides?*, AZCENTRAL (July 29, 2015), https://goo.gl/FxbeML ("They'd tell you to drink water," a detainee reported. "That's all you need, more water, they'd tell you."); Martin Rosenbluth, *In Texas, N.C. Attorney Finds 'Jail' for Immigrants*, CHARLOTTE OBSERVER (Apr. 30, 2016), https://goo.gl/gyislg (describing how parents of seriously ill kids were told to have them drink more water); Southern Poverty Law Center, *Shadow Prisons: Immigrant Detention In The South*, at 32 (2016), https://goo.gl/R67XW4 (many detainees at LaSalle Detention Center told to drink water in response to medical care requests).

### B. Physical Abuse and Excessive Force

Detainees also regularly report that they are mistreated by guards. Especially disturbing are the numerous independent reports by detainees that they have been beaten by guards who want them to sign paperwork that waives their legal rights.

In 2015, Mesa Verde Detention Center (Bakersfield, CA) guards broke Heleno Garcia Ramirez's arm to force him to give them his fingerprints and sign removal paperwork. Letter from Katherine Traverso, ACLU of Northern

California, to Sarah Saldana, Timothy Aitken, and Monty LaFave, ICE, at 2 (Nov. 12, 2015), https://goo.gl/I95kMW. After Ramirez refused to sign paperwork he believed would result in his deportation, two guards grabbed him by his right arm, another grabbed his left, and a fourth put his arms around Ramirez's neck. *Id.* They bent him over a counter, and the guard holding his left arm bent it backwards until Ramirez heard a snap. *Id.* Then they forced Ramirez to give them his fingerprints. *Id.* A doctor had to put Ramirez's arm in a plaster cast for a month, and then in a brace. *Id.*

A number of detainees at Etowah County Jail in Alabama have reported that guards take detainees into isolated rooms and beat them to pressure them to sign removal paperwork. Letter from Christina Mansfield, CIVIC, to Sarah Saldana, ICE; and John Roth, and Megan Mack, DHS, at 3 (July 14, 2015) ("CIVIC has received numerous complaints in the form of in-person witness testimony, phone call conversations, and letters indicating that there was an ongoing practice of people detained by ICE being beaten by ICE officers when they resisted signing travel documents."); *see also Shadow Prisons*, at 58 ("This investigation found several reports of abuse of force, including the use of physical force by ICE agents to coerce detainees to sign travel document and provide fingerprints.").

For example, in 2013, one Etowah detainee was taken from his cell in handcuffs and brought to an ICE office where he was beaten by three ICE officers. Letter from Christina Mansfield, CIVIC, to Sarah Saldana, ICE; and John Roth, and Megan Mack, DHS (July 14, 2015). They ordered him to sign papers,

forced his head down and pulled his arms back, and forced his thumb print on a piece of paper that they never gave him a chance to read. *Id.* The detainee sought medical assistance and filed a grievance, only to be transferred days later to the LaSalle Detention Center in Louisiana. *Id.* Several witnesses provided written statements that they saw the detainee being taken out of his cell and returned to his cell with injuries. *Id.* And, in a series of 2016 interviews, several Etowah detainees reported that Leonardo Gutierrez, a fellow detainee, was assaulted by four ICE agents to coerce him to sign travel documents. *Shadow Prisons* at 58. One detainee who witnessed the incident described it this way: "[The] deportation officer hit [him] in the head and slammed him against the wall, because [he] did not want to sign papers. . . . Everyone in the unit saw it happen." *Id.*

A detainee at Baker County Detention Center in Florida reported that a guard beat him after he asked for the air conditioning to be adjusted. *Id.* at 47. The request enraged the guard, who slammed the detainee's head on the floor, pinned him down, and handcuffed him. *Id.* Another guard moved the detainee into the hallway, where he was held down as a guard twisted his testicles. *Id.* The man was eventually taken to the medical unit, where he received several stitches. *Id.* He was told not to report what had happened, placed in segregation for two days, and then transferred to another facility. *Id.* The Southern Poverty Law Center's investigation found many detainees who had been assaulted at Baker and then transferred to another facility. *Id.*

### C. Arbitrary and Retaliatory Use of Extended Solitary Confinement

Solitary confinement is "a further terror and peculiar mark of infamy." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (quoting *In re Medley*, 134 U.S. 160 (1890)). It can have serious psychological, psychiatric, and sometimes physiological effects. Peter S. Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 502 (2006) (noting that "[a] long list of possible symptoms from insomnia and confusion to hallucinations and outright insanity has been documented"). And yet, detainees are often isolated for extended periods for arbitrary or retaliatory reasons.

A recent investigation revealed that on any given day, 300 immigrants are held in solitary confinement at the 50 largest detention facilities. Ian Urbina and Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), https://goo.gl/YZuxtV. Half were isolated for over two weeks; 1 in 9 was isolated for over two months. *Id.* For example, a detainee in Oakdale Federal Detention Center in Louisiana was segregated for eight months without review; the man was never found guilty of violating a facility rule. National Immigrant Justice Center *et al.*, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, at 23 (2012), https://goo.gl/Nm6sVI. A detainee in New Jersey's Essex County Correctional Facility was sentenced to 15 days in solitary confinement after refusing to close his food port and demanding to see a sergeant when he found worms in his food. Sonya Chung and Andrea Savdie, *Isolated In Essex: Punishing*

*Immigrants Through Solitary Confinement*, NEW YORK UNIVERSITY SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC *et al.*, at 26 (2016), https://goo.gl/2kRMrD. Another man in Illinois' Tri-County Detention Center was segregated for a month after he tried to advocate on behalf of a Muslim detainee who could not speak English well; each day, the warden would ask him if he was "broken" yet. *Invisible in Isolation*, at 17.

Female detainees at Louisiana's LaSalle Detention Center recently reported being placed in solitary simply because the facility was overcrowded and there was nowhere else to place them; one woman said she spent an entire week in solitary. *Shadow Prisons*, at 34. A detainee in Stewart Detention Center in Georgia spent 28 days in solitary confinement after complaining about worms in the food; guards said he was "agitating the detainees." *Id.* at 41.

Detention centers also use solitary confinement to punish detainees for exercising their First Amendment rights when they go on hunger strike to protest conditions in the facility. In 2014, the ACLU of Washington State had to sue ICE to ask that they release hunger strikers from solitary confinement in the Northwest Detention Center in Tacoma. *See* Notice of Dismissal, *Ramirez-Martinez v. United States*, 14-cv-5273-RJB (W.D. Wash. May 12, 2014), ECF No. 17 (plaintiffs voluntarily dismissed case two months after being segregated when the facility ended their isolation). Similarly, in recent years, eight detainees were put in solitary confinement in Essex County Correctional Facility for going on hunger strike; they spent an average of 15 days in solitary, longer than for any other category of

offense—including physical altercations. *Isolated In Essex*, at 22–23. A detainee at Etowah reported that a hunger strike resulted in a facility-wide lockdown for two weeks. *Shadow Prisons*, at 59.

Mentally ill detainees suffer especially serious harm in solitary confinement; isolation exacerbates the symptoms of mental illness and increases suicide risk. Jeffrey Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY LAW 104, 105 (2010). Ermis Calderone, a detainee who suffered from bipolar disorder and frequent panic attacks, was segregated for over six months at Stewart Detention Center in 2011. ACLU, *Prisoners of Profit: Immigrants and Detention in Georgia*, at 63 (2012), https://goo.gl/Zld1Lm. He stopped receiving his prescribed medication, suffered a panic attack, and began hitting himself in the head and striking his head against the wall. *Id.* Guards who saw Calderone hurting himself threw him to floor and cuffed him. *Id.* A nurse told Calderone that he had had a stroke and that he should stop saying it was a panic attack; an outside physician later confirmed that he had had had a panic attack. *Id.* Calderone was placed in segregation even though nobody was hurt or threatened; he remained in solitary confinement for six months. *Id.* When ACLU lawyers eventually spoke with Calderone, his knuckles were bruised from punching the wall of his cell, and his arms and wrists were still raw and scabbed from a recent suicide attempt. *Id.*

LGBTQ detainees also face an increased risk of extended solitary confinement. Washoe County Jail's policy states that people with "overt homosexual

tendencies" may be held in administrative segregation. *Invisible in Isolation*, at 19. A detainee at the Houston Processing Center was segregated for four months simply because he presented "effeminately." Letter from Mary Meg McCarthy, National Immigrant Justice Center, to Margo Schlanger, DHS, at 5 (Apr. 13, 2011), https://goo.gl/DAAZcQ. In a recent interview of 28 transgender women in Santa Ana City Jail in California, half said they had been held in solitary confinement, some for as long as eight weeks. Human Rights Watch, *"Do You See How Much I'm Suffering Here?": Abuse against Transgender Women in US Immigration Detention*, at 35 (2016), https://goo.gl/4ym1XH. One transgender detainee said that she was kept in solitary confinement for over four months at a Louisiana facility because "they told me I couldn't be housed with other people. . . . A guard told me it was 'because I had long hair and breasts.' . . . One of the guards told me that he was 'tired of seeing faggots.'" *Id.* at 36.

### D. Sexual Assault

Advocates who interview detainees also routinely hear reports of sexual assault in detention centers. *See, e.g.*, ACLU, *Sexual Abuse in Immigration Detention* (last visited Dec. 20, 2016), https://goo.gl/zmTsq3 (mapping 200 allegations of sexual abuse over a four-year period). Detainees are isolated, powerless, and afraid of being removed; guards have enormous power over them. National Prison Rape Elimination Commission, *Report*, at 21–22 (2009), https://goo.gl/MBMlrz ("Many factors . . . make immigration detainees especially vulnerable to sexual abuse. . . . Because immigration detainees are

confined by the agency with the power to deport them, officers have an astounding degree of leverage.").

A former transportation guard at Texas' Willacy Detention Center told reporters that cover-ups of sexual and physical abuse were "pervasive" at Willacy. Catherine Rentz, *How Much Sexual Abuse Gets "Lost in Detention"?*, PBS FRONTLINE (Oct. 19, 2011), https://goo.gl/dwjC1O. In one instance, a manager called the guard in to transport a female detainee who claimed she'd been raped; the detainee was still in the medical unit receiving a rape kit. *Id.* The guard said the manager asked her to find the next flight out for the detainee. *Id.* "Make sure nobody talks to her," he said. *Id.* "Don't say nothing to her. Just get her in the van and meet up with the U.S. Marshals up at the airport." *Id.*

A detainee interviewed for that same report illustrated how sexual assault in detention centers gets buried. She said that a Willacy guard had repeatedly made advances on her, and ultimately penetrated her with his fingers. *Id.* When she pushed him away and threatened to report him, he replied, "Who's going to believe you? You're criminals. You're a detainee. Who are you going to go complain to?" *Id.* He later added, "If you tell anyone, you wouldn't come out of here alive to see your family." *Id.* Another guard told her it was "useless" to complain, and that complaining would only make things worse. *Id.* To escape her assailant, she agreed to be deported immediately. *Id.*

Despite the difficulty of reporting and proving sexual assault, detainees are sometimes able to bring their suffering to light. In 2016, a guard at Berks County Residential Center was convicted of sexually

assaulting a 19-year-old detainee from Honduras. Renée Feltz, *Immigration Facility Guard Given Jail Time for Sexual Assault of Detainee*, THE GUARDIAN, (Apr. 23, 2016), https://goo.gl/Sd55bl. The guard demanded she have sex with him, which she acquiesced to under pressure. *Id.* In a statement to the court, she said: "Whenever I'd denied his demands, he'd get very angry and humiliated me. . . . He would tell me that if immigration ever found out, my son and I would be deported instantly, which is why I obeyed." *Id.* The rape only came to light after a seven-year-old girl told a psychologist at the facility that she had a hard time falling asleep and was "afraid" to go to the bathroom after witnessing the guard and the detainee together in a bathroom stall. *Id.*

In 2009, a guard at the Port Isabel Detention Center in Texas pleaded guilty to sexually assaulting a number of women. Press Release, U.S. Dep't of Justice, *Detention Officer Sentenced for Repeated Sexual Abuse of Detainees* (Apr. 7, 2010), https://goo.gl/mOK6kX. The guard would sneak into medical isolation rooms where he would grope female detainees, assuring them that he had been ordered to examine them by a physician and instructing them to disrobe. *Id.*

In 2009–10, a male guard sexually assaulted eight female detainees held at the T. Don Hutto Residential Center in Taylor, Texas, while he was driving them to bus or airport stations and nobody else was around. *Doe v. Neveleff*, No. A-11-cv-907-LY, 2013 WL 489442, at *2 (W.D. Tex.), *report and recommendation adopted*, No. A-11-cv-907-LY, 2013 WL 12098684 (W.D. Tex. Mar. 12, 2013). The officer

would stop at a gas station or house, or simply pull off to the side of the road, and then grope or fondle the women. *Id.* He later pleaded guilty to state and federal criminal charges arising from these assaults. *Doe v. Robertson*, 751 F.3d 383, 385 (5th Cir. 2014).

LGBTQ detainees face a special risk of sexual abuse. In a 2015 letter to the head of DHS, 35 U.S. Representatives expressed their concern that LGBTQ detainees were "extremely vulnerable to abuse, including sexual assault, while in custody." Letter from Rep. Michael M. Honda *et al.*, U.S. House of Representatives, to Secretary Jeh Johnson, DHS, at 1 (June 23, 2015), https://goo.gl/fvXoEa. They noted a Bureau of Justice Statistics study which found that LGBTQ detainees "experience sexual assault at up to ten times the rate of heterosexual men" in custody, and that "the situation is starker for transgender detainees . . . one in three [of whom] will be sexually abused within twelve months in custody. *Id.*

### E. Children in Detention

The physical and mental suffering inherent in imprisonment falls especially hard on children incarcerated with their parents at family detention centers. Conditions in these facilities are troubling enough that 136 U.S. Representatives wrote a letter to the head of DHS in 2015 calling to "end the use of family detention." Letter from Rep. Zoe Lofgren *et al.*, U.S. House of Representatives, to Secretary Jeh Johnson, DHS, at 1 (May 27, 2015), https://goo.gl/adyzk5.

Detained children are exposed to a variety of risks and harms including medical neglect. Catherine Checas was a three-year old when she and her

mother Gladys were sent to Berks County Residential Center in Pennsylvania. Ed Pilkington, *Child Immigrant Detainees: 'There's An Overwhelming Sadness Among Them'*, THE GUARDIAN, (May 12, 2015), https://goo.gl/ijpYuc. One morning in 2015, Catherine started vomiting blood in front of her mother and the five other people in their cell. *Id.* When she sought help, Gladys said that facility staff simply told her that Catherine should "drink lots of water". *Id.* Only when Catherine's bloody vomiting continued into a fourth day was she taken to the local hospital. *Id.*

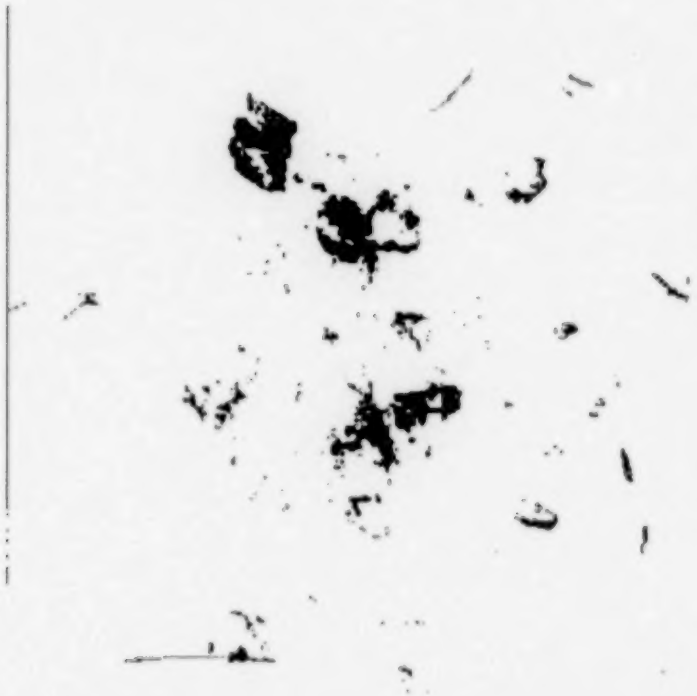

Image 1: Three-year-old detainee Catherine Checas' blood-stained shirt. Berks staff told her to "drink lots of water." *Id.*

The president-elect of the American Academy of Pediatrics recently visited Berks and decried its effects on the children there: "As a pediatrician, I am concerned that the federal government's current policy of detaining children is exacerbating their risk for physical and mental health problems and needlessly exposes them to additional trauma."

Bernard Dreyer, *Dreyer: Immigration Detention Centers Are No Place for Children*, HOUSTON CHRONICLE (Dec. 16, 2015), https://goo.gl/Y3XE1H. Dr. Dreyer stated: "Talking about their children, parents related symptoms of depression, anxiety, adjustment disorders, behavioral regressions and suicidality." *Id.*

Dr. Olivia Lopez, formerly the lead licensed social worker at Karnes, testified before a Texas state agency that the facility used "isolation and sensory deprivation against children and their mothers as punishment." *Pub. Hr'g Regarding Proposed 40 TAC § 748.7, Tex. Dep't of Fam. & Prot. Servs.*, at 24–25 (Dec. 9, 2015), https://goo.gl/cXPFRK (statement of Dr. Olivia Lopez). She also testified that she was reprimanded for recording mental health or medical issues, because "[it] was very clear that GEO [the company that operates the facility] did not want a paper trail." *Id.* at 26. She said families were frequently "turned away when they presented [guards] with serious issues"—one example being a toddler who was taken to the infirmary four times with serious abdominal pain before being taken to the hospital for an emergency appendectomy. *Id.* at 26–27.

### F. Interference With Religious Practice

Religious minorities frequently report being denied the freedom to practice their religion in detention centers. Reports range from simple denial of the ability to practice to mockery and denigration from staff to outright cruelty.

A former GEO Group officer at the Adelanto facility in California explained that two Muslim men

were put into solitary confinement for "quietly saying their daily prayers together." CIVIC & Detention Watch Network, *Abuse In Adelanto: An Investigation Into A California Town's Immigration Jail*, at 22 (2015), https://goo.gl/UhcJdf. In 2016, three kitchen workers at the Batavia Federal Detention Center in New York were suspended for serving Muslim detainees chicken out of the garbage for their Ramadan meals. WKWB Staff, *Detention Facility Workers Allegedly Used Bad Poultry, Placed On Leave*, WKBW, (Jul. 21, 2016), https://goo.gl/q7jsrW. A Yemeni man in Wisconsin's Dodge County Detention Facility told officers that he was going to fast for 30 days during Ramadan, and requested that he be excused from meals. *Invisible in Isolation*, at 17. Officers responded by putting him in solitary confinement for the remainder of Ramadan. *Id.*

A Muslim detainee at the Irwin County Detention Center requested a halal diet, but the facility would not provide it; the chaplain told him that it was too expensive to provide religious diets such as kosher, so they do not provide them. *Prisoners of Profit*, at 101. Detainees at Baker County Detention Center and Wakulla County Detention Center in Florida recently reported difficulty getting religious meals. *Shadow Prisons*, at 50, 67. Muslim detainees at Stewart were removed from the "Ramadan list" because they broke their fast on one day. *With Liberty And Justice For All*, at 118–19.

### G. Conditions of Confinement

Finally, non-citizens often face stark deprivations of basic needs. They are given meager portions of food that is sometimes spoiled or bug-infested. They

are held in cells that are unsanitary. Complaints like these are routine, and come from every type of facility across the country.

Detainees in Louisiana's LaSalle Detention Center reported that they had been served moldy bread, spoiled milk, and bad canned goods; a number of them said the food had given them nausea, diarrhea, or bacterial infections. *Shadow Prisons*, at 35. At Irwin County Detention Center in Georgia, detainees describe being served expired food, food with cockroaches, hair, or flies, and getting sick from the food.

In July 2012, 100 detainees at Etowah County Jail in Alabama went on hunger strike and sent a letter to ICE, complaining that the facility was serving food that was rotten and nutritionally inadequate. Detention Watch Network, *Expose and Close: Etowah County Detention Facility*, at 5 (2012), https://goo.gl/3cZguL. In 2015, 26 women in the T. Don Hutto Residential Facility went on a hunger strike to protest being "repeatedly served rotten milk and undercooked, and even uncooked, food." Alexa Garcia-Ditta, *Hutto Hunger Strike Reportedly Growing Despite ICE Denials*, TEXAS OBSERVER (Nov. 5, 2015), https://goo.gl/lY81yZ.

Detainees are often forced to drink dirty or foul-smelling water that makes them sick. Detainees warn new arrivals at Stewart Detention Center not to drink the water, which they say is "discolored and leads to serious illness." *Shadow Prisons*, at 42. Women held at the private South Texas Family Residential Center reported that the water there "tasted bad and made children sick with stomach

aches or vomiting." Liz Farmer, *Immigrant Detention Centers Are More Like Jails, Mothers Say*, DALLAS MORNING-NEWS (May 14, 2016), https://goo.gl/FMU9vG. A detainee at Karnes signed a declaration stating, "The water was Clorox. That's what it tasted and looked like." Declaration of Hilda Ramirez at 2, Am. Immigr. Lawyers Ass'n, Doc. No. 1510060 (2016), https://goo.gl/156xz5.

Detainees also report being held in filthy or unsanitary cells. In 2016, detainees in the West Texas Detention Center reported that guards told them to defecate in plastic bags after the water stopped working for three days and the toilets filled up with human waste. Mónica Ortiz Uribe, *Federal Detention Facility In West Texas Called Out After Inmates Complain Of Inhumane Treatment*, FRONTERAS (Mar. 16, 2016), https://goo.gl/mmv8Sv. A detainee in California's Otay Mesa Detention Center said that there were bed mites in the mattresses, and that he got scabies twice while detained there. Anonymous Declaration #3 at 3, Am. Immigr. Lawyers Ass'n, Doc. No. 1510060 (2016), https://goo.gl/156xz5. A committee investigating the Hudson County Correction Center in New Jersey recently found "credible evidence of a recurring problem with mold, flies and other unsanitary conditions in the shower and bathroom areas that could be the cause of bacterial infections." Hector Velazquez *et al.*, *A Report on the Medical Care and Treatment of ICE Detainees Housed in the Hudson County Correctional Center*, at 13 (2016), https://goo.gl/aK9fD2.

## III. Because Of DHS's Repeated Failures, *Bivens* Is Needed As A Check On Abuses In Immigrant Detention

DHS has consistently failed to provide safe, humane conditions of confinement, and it has willfully disregarded system-wide abuses uncovered by advocates as well as its own inspections. Those failures are likely to continue unabated because, as evidenced by a recent DHS report, the agency has no viable plan to do otherwise. A *Bivens* remedy, therefore, remains an important check on abuses in detention.

### A. DHS and ICE Have a Track Record of Failing to Correct Systemic Abuses

Eighteen years after adopting detention standards, DHS struggles to implement them. After intense lobbying by the American Bar Association to adopt standards to ensure detainee safety and protect detainee rights, ICE's precursor, the Immigration and Naturalization Service (INS) adopted detention standards in 1998 and expanded those standards to all facilities in 2000. *A Broken System*, at 4. From 2001 forward, advocacy groups documented numerous violations of the standards. *Id.* at xii, 2. The report highlighted the pervasive failures at detention facilities using ABA, UNHCR, and ICE's own inspection reports from 2001 through 2005. *Id.* at 2. In 2009, ICE recommended that it adopt standards appropriate for civil detention rather than pretrial criminal detention. *Immigration Detention Overview*, at 16. It also noted that improvements in medical care, recreation, access to law libraries, visitation, religious services, and segregation policies,

among other things, were needed. *Id.* at 21.

Recent reviews show that pervasive violations continue to exist. A 2015 study of ICE inspection data from 2007 to 2012 confirmed that "ICE's oversight practices under the Obama Administration remain fundamentally unchanged and unreformed." *Lives in Peril*, at 2. At six facilities, inspectors found substantive and pervasive violations of detention standards on medical care, suicide prevention, telephone access, recreation, visitation, and more. *Id.* at 17–28. Despite these failures, ICE did not discontinue use of these facilities or place facilities on probation to ensure corrective action. *Id.* at 29.

In addition, the Government Accountability Office (GAO) recently released two reports detailing ICE's persistent problems with respect to medical care and implementing the detention standards. *See* GAO, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care*, at 37–38 (2016), https://goo.gl/9frhua; GAO, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, at 33 (2014).

### B. DHS and ICE Have No Plans to Ensure Safe, Humane Conditions of Confinement in the Future

Although much of the recent debate surrounding immigration detention has focused on privately operated facilities, that debate has obscured a larger point: DHS's problems are systemic, and abuses occur throughout all facilities. In August 2016, the U.S. Department of Justice released a report finding that private prisons housing Bureau of Prisons inmates

were less safe and less effective than government-run prisons. Matt Zapotosky and Chico Harlan, *Justice Department Says It Will End Use of Private Prisons*, WASH. POST, (Aug. 18, 2016), https://goo.gl/R7AqbD. As a result, DOJ instructed BOP to reduce and ultimately end its private prison contracts. *Id.* Shortly thereafter, DHS began a review of the use of private prisons in immigration detention. Although it declined to call for an end to private contracting, the Committee acknowledged the continuing challenges in maintaining safe, humane conditions in *all* immigration facilities. *See HSAC Report.* The Committee concluded, importantly, that "[s]ignificant challenges persist in assuring that actual on-the-ground practice lives up to the full requirements—in *all types of ICE detention facilities* (whether ICE-run, private-contractor-operated, or county jail)." *Id.* at 12 (emphasis added).

The future of immigration detention is unclear, as a new Secretary of Homeland Security takes the helm in coming weeks. But the DHS Committee Report makes one thing abundantly clear: The institutional failures that have plagued the immigrant-detention program in the United States will not abate, regardless of whether ICE decreases its reliance on private contractors. For at least the last thirty years, despite yearly inspections, reports, and studies, DHS has failed to protect the safety and basic rights of detainees.

### C. The *Bivens* Remedy is an Essential Tool to Check the Worst Abuses in Immigrant Detention

Given the DHS failure to curb abuses, the

availability of the *Bivens* remedy to redress constitutional violations is critical to ensuring greater accountability and deterrence of future abuses. The Court should preserve the availability of *Bivens* to redress the most serious abuses in immigration detention, such as the ones alleged by respondents in this case.

Maintaining a *Bivens* remedy in the immigration context is essential to vindicate the rights of detainees and deter future abuses. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Correctional Serv's Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Its remedial nature has also been recognized, particularly in situations where, for the plaintiffs, "it is damages or nothing." *Davis v. Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). The availability of a *Bivens* remedy will vary from case to case. Nevertheless, keeping *Bivens* claims alive in the immigration context fits well within the purposes of the doctrine, as there will likely be no other effective deterrent to constitutional violations or remedy for detainees once those violations occur.

## CONCLUSION

The extensive abuses of detained immigrants detailed above demand a *Bivens* remedy. DHS has failed to improve its policies and practices to ensure immigrants can be detained without Constitutional violations. The decision below maintains *Bivens* claims, a critical backstop against the worst abuses. It should be affirmed.

Respectfully submitted,

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# APPENDIX

## APPENDIX–LIST OF *AMICI CURIAE*

**Adelante Alabama Worker Center (Adelante)** is a non-profit organization and a project of the National Day Laborer Organizing Network. Adelante unites low-wage and immigrant workers and their families in the Birmingham area to defend their rights, promote their dignity, and pursue justice for all. Adelante is the anchor organization for the Shut Down Etowah campaign, which aims to expose human rights abuses at the Etowah Detention Center in Gadsden, Alabama. Adelante co-authored the groundbreaking report *Shadow Prisons*, on conditions in immigrant detention in the South, and represents several Etowah detainees seeking release from extremely prolonged detention.

**American Gateways (AG)** is a non-profit immigration legal services provider based in Austin, Texas. AG provides pro bono and low-cost legal services to the low-income immigrant community throughout Central Texas, serving the cities of Austin and San Antonio and 19 surrounding counties. AG also provides legal education, assisted pro se workshops, and pro bono representation at four immigration detention centers in the region, including the T. Don Hutto Residential Center, the South Texas Detention Complex, the Karnes County Residential Center, and the South Texas Family Residential Center. AG's clients are DREAMers, families seeking reunification, and survivors of persecution, human trafficking, crime, and family violence.

**Americans for Immigrant Justice (AI Justice)** is a non-profit law firm dedicated to

promoting and protecting the basic rights of immigrants. Since its founding in 1996, AI Justice has served over 90,000 immigrants from all over the world. AI Justice clients include unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking and their children; immigrants who are detained and facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum and citizenship. Over the past two decades, AI Justice has served thousands of individual non-citizens who face prolonged detention. A substantial portion of AI Justice clients are children, some unaccompanied, who have been irreparably traumatized and victimized by abuse and violence and are seeking refuge as asylum seekers. In fact, AI Justice is the only organization in South Florida that represents minors detained in two permanent and one influx (temporary) local immigration shelters. Part of AI Justice's mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued and encouraged. In Florida and on a national level, AI Justice champions the rights of immigrants; serves as a watchdog on immigration detention practices and policies; and speaks for immigrant groups who have particular and compelling claims to justice. AI Justice is dedicated to advancing and defending the rights of immigrants in detention.

**Community Initiatives for Visiting Immigrants in Confinement (CIVIC)** is the national immigration detention visitation network, which is working to end U.S. immigration detention

by monitoring human-rights abuses, elevating stories, building community-based alternatives to detention, and advocating for system change. CIVIC provides weekly visits to people detained in over 43 immigration detention facilities through its network of affiliated visitation programs, and CIVIC receives over 7,000 calls per month from people detained in all 210 immigration detention facilities. Therefore, CIVIC works every day with people who face abuse in immigration detention. Last year, CIVIC filed federal complaints with the Office for Civil Rights & Civil Liberties at DHS on behalf of 125 people in immigration detention who were the victims of abuse and neglect. Many of these instances of abuse were perpetrated by officers inside the immigration detention facilities. Currently, CIVIC is working with 318 people who have reported abuse, including excessive use of solitary confinement, medical abuse/neglect, sexual harassment, rape, and physical abuse.

**Detention Watch Network (DWN)** is a coalition of approximately 200 organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States. DWN has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for more than two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. DWN members are lawyers, activists, community organizers, advocates, social workers, doctors, artists, clergy, students, formerly detained immigrants, and affected families from around the country. They are engaged

in individual case and impact litigation, documenting conditions violations, local and national administrative and legislative advocacy, community organizing and mobilizing, teaching, and social service and pastoral care. For years, DWN and its members have carefully documented egregious abuses inside of detention. DWN's interest in this litigation arises from how difficult it is to hold any person or entity meaningfully accountable to prevent the same abuses from being perpetrated again.

**Families for Freedom (FFF)** is a New York-based, multi-ethnic human rights organization by and for families facing and fighting deportation. FFF consists of and advocates for immigrant prisoners (detainees), former immigrant prisoners, their loved ones, or individuals at risk of deportation. Its members come from dozens of countries, across continents. FFF seeks to repeal the laws that are tearing apart homes and neighborhoods, build the power of immigrant communities as communities of color, and provide a guiding voice in the growing movement for immigrant rights as human rights. As people of color with criminal records, FFF members are constantly at risk of being "disappeared" through the policies FFF fight against. But for that reason, FFF must continue to fight.

**Florence Immigrant and Refugee Rights Project (Florence Project)** is a Legal Orientation Program (LOP) site of the Executive Office of Immigration Review. The Florence Project provides orientation services to detained adult men and women, as well as unaccompanied minors in removal proceedings. In 2015, over 11,000 detained children, men, and women facing removal charges observed a

Florence Project presentation on immigration law and procedure. That same year, Florence Project provided individualized pro se support services to approximately 2,500 detained adult immigrants. Every year, in addition to the aforementioned support to pro se respondents, the Florence Project also uses non-LOP funding to directly represent individuals before the Immigration Judge and Board of Immigration Appeals and provide social services to detained men, women, and children. All of the adult immigrants Florence Project assists are detained by ICE in remote locations in Florence and Eloy, Arizona. In any given year Florence Project encounters hundreds of detainees with complaints regarding medical neglect or mistreatment, substandard conditions, and other abuse that individuals may have faced in detention. The Florence Project provides information and basic translation assistance to detainees filing complaints with the Office of Civil Rights and Civil Liberties, but such complaints rarely result in significant changes in policy or oversight. The Florence Project firmly believes that all detainees in immigration custody deserve to have their fundamental constitutional and human rights respected.

**Grassroots Leadership** is an Austin, Texas-based national organization that works to end prison profiteering and reduce reliance on criminalization and detention through direct action, organizing, research, and public education. Since 2006, Grassroots Leadership has engaged in advocacy related to immigration detention policy. Between 2006 and 2009, Grassroots Leadership advocated as part of a successful campaign to end family detention

at the T. Don Hutto Detention Center in Taylor, Texas. When the Obama administration announced that it would stop detaining families at Hutto, only 100 family detention beds remained at a small facility in Berks County, Pennsylvania. However, after the wave of Central American families and children seeking refuge at the border in the summer of 2014, the administration reversed its decision, opening facilities at Karnes, Texas, and Dilley, Texas. Grassroots Leadership has operated a visitation program to the T. Don Hutto detention center since 2009 to break the isolation of detention, monitor human rights at the facility, and build advocates for reform of detention. Grassroots Leadership has authored or co-authored numerous publications on immigration detention issues including *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, published in 2015, and *For-Profit Family Detention: Meet the Private Prison Companies Making Millions by Locking Up Refugee Families*, published in 2014.

**Human Rights Watch** is a non-profit, independent organization that investigates allegations of human rights violations in more than 90 countries around the world, including in the United States, by interviewing witnesses, gathering information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights with governments and international organizations and mobilizes public pressure for change.

**Immigrant Defense Project (IDP)** is a not-for-profit legal resource and training center dedicated

to promoting fundamental fairness for immigrants accused or convicted of crimes. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving criminal, immigration, and detention law. IDP seeks to improve the quality of justice for immigrants accused of crimes, including those who are detained, and therefore has a keen interest in ensuring that detained noncitizens receive the full benefit of their constitutional and statutory rights. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal, immigration, and detention law and the rights of immigrants in the criminal and immigration systems.

**Immigration Equality** is a national organization that advocates for the rights of lesbian, gay, bisexual, transgender, queer, (LGBTQ) and HIV-positive immigrants. It directly represents hundreds of immigrants throughout the United States and provides free legal advice to thousands more. Many of Immigration Equality's clients have been detained by Immigration and Customs Enforcement while they were in removal proceedings. Immigration Equality also maintains a pro bono asylum project, provides technical assistance to attorneys, and maintains an informational website. Furthermore, Immigration Equality authored in large part *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*, the training module for United States Citizenship and Immigration Services.

**National Immigrant Justice Center (NIJC)** is a Chicago-based non-profit organization, accredited

since 1980 by the Board of Immigration Appeals (BIA) to provide representation to individuals in removal proceedings, including individuals in DHS custody. Together with area law school clinics and a network of 1,500 pro bono attorneys, NIJC provides legal rights presentations, individual legal consultations, and legal representation annually to more than 4,000 individuals in DHS custody. While NIJC's legal services are primarily focused on six county jails in Illinois, Indiana, Wisconsin, and Kentucky, NIJC has a long track-record of monitoring and reporting on conditions of detention in the immigration context throughout the United States and is well-positioned to speak to difficulties in ensuring that noncitizens in immigration detention are not subjected to abusive or punitive detention practices.

**National Immigration Law Center (NILC)** is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity, and justice. NILC has earned a national leadership reputation for its expertise in the rights of immigrants, including litigating key immigration detention cases to protect the rights of detained noncitizens. NILC's interest in the outcome of this case arises out of a concern that foreclosing a *Bivens* remedy to immigrants held in immigration detention will severely undermine the rights of all detained noncitizens.

**Pennsylvania Immigration Resource Center (PIRC)** is a non-profit organization whose mission is to serve vulnerable immigrant populations in Pennsylvania. Through the Department of Justice's Legal Orientation Program, PIRC provides legal orientations, pro se deportation relief workshops, and pro bono referrals to individuals with cases before EOIR and the BIA. All of the individuals who receive services through PIRC's programs are detained by ICE at the York County Prison or the Berks County Residential Center, and the population includes family units and young children. PIRC also provides free direct representation to vulnerable detained individuals, with a focus on asylum seekers, survivors of trauma, the indigent, and those with competency issues.

**Project South** is a Southern-based leadership development organization that creates spaces for movement building. Project South works with communities pushed forward by the struggle to strengthen leadership and to provide popular political and economic education for personal and social transformation. Project South builds relationships with organizations and networks across the US and global South to inform Project South's local work and to engage in bottom-up movement building for social and economic justice. Project South is working to defend the rights of immigrants and Muslim communities across the US South.

**Public Counsel** is the nation's largest pro bono law firm based in Los Angeles, California. Founded in 1970, Public Counsel's primary goals are to: (1) protect the legal rights of disadvantaged children; (2) represent immigrant victims of torture,

persecution, domestic violence, trafficking, and other crimes; and (3) foster economic justice by providing underserved communities with access to quality legal representation. In support of these goals, Public Counsel represents indigent immigrants from around the world in their claims before the United States Citizenship & Immigration Services, the Executive Office for Immigration Review, and the federal courts. Over the past eight years, Public Counsel's Immigrants' Rights Project has provided legal services to over 2,500 immigrants detained by the Department of Homeland Security, ranging from legal orientations and pro se assistance to direct representation in removal and bond proceedings.

**Refugee and Immigrant Center for Education and Legal Services (RAICES)** is a BIA-recognized, non-profit, legal services agency with seven offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, advocacy, policy, and litigation. In 2015, RAICES provided legal services to over 10,000 individuals, including many adults and families detained in DHS custody. In 2016, RAICES has provided legal services to individuals detained at many detention centers throughout the United States.

**Sisters of Mercy of the Americas (SMA)** is a Roman Catholic congregation of women committed to stand in solidarity with immigrants. SMA is engaged in a variety of efforts on behalf of undocumented immigrants, including visiting immigrants held in detention, providing alternatives to detention, advocating for just and humane immigration reform, and holding weekly vigils to call attention to the plight of immigrants. SMA's interest

in this case stems from its direct experience with incarcerated immigrants, some of whom have experienced the kinds of abuses described in the brief. Every human being has the right to due process and to seek redress from violations of basic human rights.

**Southern Poverty Law Center (SPLC)** fights all forms of discrimination and works to protect society's most vulnerable members through litigation, education, and monitoring organizations that promote hate. The SPLC provides pro bono assistance to and advocates on behalf of immigrant detainees throughout the southern United States, including Alabama, Florida, Georgia, Louisiana, and Mississippi. Most recently, SPLC and its partners conducted an investigation into conditions of confinement and due process violations at immigration detention centers throughout the Southeastern United States. SPLC conducted interviews with over 300 detainees and tours of six facilities, including Baker County Detention Center (MacClenny, FL), Etowah County Detention Center (Gadsden, AL), Irwin County Detention Center (Ocilla, GA), LaSalle Detention Facility (Jena, LA), Stewart County Detention Center (Lumpkin, GA), and Wakulla County Detention Facility (Crawfordville, FL). The results are published in a recent report, *Shadow Prisons: Immigration Detention in the South.*

**Women's Refugee Commission (WRC)** is a national non-profit organization established to advocate for policies and programs that drive lasting change on the ground for women, children, and youth displaced by war, persecution, and natural disaster. The WRC conducts research, monitors detention

facilities, identifies gaps and impediments to due process, and advocates for just and humane policies towards immigrants and refugees. The WRC has visited dozens of immigration detention facilities where it monitors conditions and interviews detainees and facility staff. WRC's numerous reports on conditions of detention and detention policy and WRC's accompanying recommendation and advocacy have led to significant improvements in conditions and access to due process. These reports include: *Locking Up Family Values: The Detention of Immigrant Families, Politicized Neglect: A Report from Etowah County Detention Center*; *Migrant Women and Children at Risk: In Custody in Arizona, Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention*, and *Locking up Family Values, Again.*

No. 15-1358, 15-1359, 15-1363

# In the Supreme Court of the United States

JAMES W. ZIGLAR, Petitioner,
v.
AHMER IQBAL ABBASI, ET AL., Respondents.

JOHN D. ASHCROFT,
Former Attorney General, ET AL., Petitioners,
v.
AHMER IQBAL ABBASI, ET AL., Respondents.

DENNIS HASTY, ET AL., Petitioners,
v.
AHMER IQBAL ABBASI, ET AL., Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

## BRIEF OF KAREN KOREMATSU, JAY HIRABAYASHI, AND HOLLY YASUI AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE* [1]

*Amici* are the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, three American citizens of Japanese ancestry. As young men during World War II, these three challenged the constitutionality of the military orders subjecting Japanese Americans to curfew, forced removal, and incarceration for the duration of the war in government internment camps in desolate areas of the nation's interior. Deferring to the government's claim of military necessity, and failing to scrutinize the basis for the government's actions, the Court affirmed their criminal convictions for defying the military orders, placing its stamp of approval on one of the most sweeping deprivations of constitutional liberties in American history. *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

Forty years later, Korematsu, Hirabayashi, and Yasui successfully reopened their cases and had their wartime convictions vacated based on proof that the government had suppressed, altered, and destroyed military and civilian intelligence which directly refuted its claim that military necessity justified the wartime internment of Japanese Americans. *Korematsu*

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and neither such counsel nor a party made a monetary contribution intended to fund the brief's preparation or submission. S. Ct. Rules 37.3(a), 37.6.

*v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *affirming in part and reversing in part*, 627 F. Supp. 1445 (W.D. Wash. 1986); Order, *Yasui v. United States*, D. Or. Crim. No. C 16056, at 2 (D. Or. Jan. 26, 1984) (granting government's motion to vacate conviction and dismissing petition), *rev'd and remanded on other grounds*, 772 F.2d 1496 (9th Cir. 1985). These men showed that Internment was far more than an unfortunate "mistake," as many had concluded, but was the product of a pervasive and deliberate abuse of power.

Korematsu, Hirabayashi, and Yasui, and their children, *amici* here, know firsthand the stigmatizing damage that ensues when the judicial system, pressured by a purported national emergency, accepts an ostensibly proper government interest as sufficient to justify express racial and other classifications without subjecting those justifications to the strictest scrutiny. Although Congress eventually issued a formal apology, *amici* also know that such apologies come far too late and provide far too little to make up for the personal and constitutional harm suffered.

Honoring their fathers' legacies, *amici* have committed themselves to ensuring both that other marginalized and socially disfavored groups never again suffer the unjust stigma of officially-endorsed prejudice, and that the courts faithfully and rigorously scrutinize such invidious and destructive classifications.

*Amici* are deeply concerned with the disturbing parallels between the challenged conduct here and

the wrongful actions taken against Japanese Americans. In 1942, solely because of their race/ethnicity, over 110,000 persons of Japanese ancestry, over two-thirds American citizens, were forcibly removed from their homes on the West Coast. Without charges, trials, or convictions, they were confined for the duration of WWII in internment camps scattered among the most desolate regions of the country. In 2001, solely because of their actual or perceived national origin/ethnicity/religion, hundreds of Muslim and Arab men were indefinitely detained after 9/11 on minor immigration infractions or low level criminal charges. They were confined under an oppressive "hold-until-cleared" policy and were deliberately subjected to "extremely restrictive conditions of confinement," though there was no evidence tying them to terrorism. Some were held even after they had been cleared of such alleged ties.

The Petitioners claim they are immune and insist the Respondents' constitutional rights were not "clearly established" because the circumstances following 9/11 were "novel." To the contrary, the Petitioners' conduct was all too familiar and the constitutional harm all too predictable. Petitioners' abuse of the people detained indeed had an antecedent, one *amici see* all too clearly, in the Japanese American Internment (the "Internment").

Ever since the *Korematsu* dissenters named it for what it was, a "descent into the ugly abyss of racism," *see Korematsu*, 323 U.S. at 233 (Murphy, J. dissenting), the Internment has been condemned as the single most egregious violation of civil rights and liberties in the last century. *See* Arg. II.B, *infra*; Proclamation No.

4417, 41 Fed. Reg. 7741 (Feb. 19, 1976) (President Ford rescinds Executive Order 9066); U.S. Comm'n on the Wartime Relocation and Internment of Civilians, Congress of 1980, *Report: Personal Justice Denied*, at 18 (1982) (finding Internment lacked any national security basis, but was the product of "race prejudice, wartime hysteria and a failure of political leadership"); Civil Rights Act of 1988, 50A U.S.C. § 1989a(a) (Congress adopted CWIRC's findings and issued a formal apology to the surviving internees); Earl Warren, *The Memoirs of Earl Warren* 149 (1977) (characterizing Internment as the result of "fear, get-tough military psychology, propaganda, and racial antagonism"); *see also Korematsu*, 584 F. Supp. 1406; *Hirabayashi*, 828 F.2d 591 and 627 F. Supp. 1445; Order, *Yasui*, D. Or. Crim. No. C 16056, at 2 (vacating *amici's* fathers' wartime convictions based on government's fraud on the courts).

This is Petitioners' antecedent—an egregious wrong we promised would never happen again. The right to be free from government oppression based on race, ethnicity, national origin, or religion lies at the heart of who we claim to be and who we are as a nation. The law flouted by Petitioners could not be more clearly established. The decision of the Second Circuit should be affirmed.

## STATEMENT OF THE CASE

Respondents represent a class of foreign nationals arrested, detained, and abused by Petitioners because they are, or were perceived to be, Arab or Muslim. Complaint at ¶¶ 1, 3, 4, 61, 65, 68, 74-78, *Turkmen, et al. v. Ashcroft, et al.*, 2010 WL 6000431 (E.D.N.Y.) (Trial Pleading) (No. 02 CV 2307 (JG)(SMG)) (herein "Compl."). Though they were held during Petitioners' investigation into the attacks of September 11, they "were unquestionably never involved in terrorist activity." *Turkmen v. Hasty*, 789 F.3d 218, 223 (2d. Cir. 2015). Yet they were deliberately mistreated by the Petitioners and those acting on their behalf because of their religion or ethnicity.

Respondents' brief sets out the facts in detail. It suffices to observe that Petitioners' investigation into the September 11 attacks cast an exceptionally wide net. Petitioners Ashcroft, Mueller, and Ziglar created a policy that called for the automatic arrest of male, Muslim or Arab foreign nationals who were not in strict compliance with the terms of their visas, regardless of whether they had a connection to terrorism. Compl. at ¶¶ 1, 4, 39-49.

Respondents, like hundreds of other perceivably Arab or Muslim men, were arrested for minor immigration violations. Compl. at ¶¶ 1, 49, 51. Commonly, this amounted to having overstayed their visas. *Id.* Others were arrested for insignificant violations of the criminal code. Called upon to defend what the NEW YORK TIMES called the "spitting on the sidewalk policy," Petitioner Ashcroft demurred, saying

only that, "It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism." Philip Shenon & Don Van Natta, Jr., *A Nation Challenged: The Investigation; U.S. Says 3 Detainees May Be Tied to Hijackings*, NEW YORK TIMES, Nov. 1, 2001, http://www.nytimes.com/2001/11/01/us/nation-challenged-investigation-us-says-3-detainees-may-be-tied-hijackings.html.

Upon arrest, Respondents were subjected to a "hold-until-cleared" policy. Compl. at ¶¶ 2, 51-60. This consisted of Petitioners' conscious decision to detain Respondents without bond or just cause for a period far longer than they would have been detained on their immigration or criminal charges alone. *See id.* In some instances, detainees were arrested and held even after they had been cleared of any connection to terrorism. *See, e.g.* Joint Appendix (JA) 104-05, 141-42 (Office of Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003), https://oig.justice.gov/ special/0306/full.pdf ("OIG Report")).

Respondents were confined at the Metropolitan Detention Center ("MDC") in New York, where they were held under exceptionally severe conditions. JA 341-42 (Office of Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003), http://www.usdoj.gov/oig/special/0312/final.pdf ("Supplemental OIG Report"). When MDC officials learned they would receive aliens who might be suspects in

the September 11 attacks, Petitioner Hasty ordered that a pre-existing secure unit in the facility be converted into an "Administrative Maximum Special Housing Unit" ("ADMAX SHU"), and directed his subordinates to design "extremely restrictive conditions of confinement." Compl. at ¶¶ 24, 75; *see also id.* at ¶ 76 (describing the conditions in the ADMAX SHU). Petitioners Hasty and Sherman imposed these harsh conditions even though they knew "the FBI had not developed any information to tie the [Respondents] . . . to terrorism." *Id.* at ¶ 69.

Petitioners ordered that some detainees be held in solitary confinement, though they presented no risk and violated no rules. JA343. Detainees remained in their cells at least 23 hours a day, cut off from virtually all human contact. Until late February 2002, the cells were constantly illuminated. *Id.* At Petitioner's discretion, MDC officials deliberately prevented the Respondents from communicating with each other and with the outside world, including counsel. Compl. at ¶¶ 79-82; JA 72, 220-224.[2]

Within the facility, abuse was widespread. The OIG found that a "significant number" of MDC staff members repeatedly subjected the detainees to physical and verbal abuse. JA 350-51. Detainees were slammed against walls, doors, and the insides of elevators. *Id.* at 351-64. Their arms, hands, wrists, and fingers were bent and twisted. *Id.* at 364-67. They were dragged or lifted off the ground by their restraints. *Id.* at 367-70. They were punched, kicked, and beaten. *Id.* at

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[2] For a more complete recitation of the facts surrounding the use of solitary confinement, *see* Brief of Medical Professionals as *Amici Curiae* in Support of Respondents and Affirmance, 2-5.

380-83. On one occasion, a staff member threatened to "break [a detainee's] neck." *Id.* at 351, 384. They were subjected to degrading and sexually humiliating strip searches. *Id.* at 391-95. When detainees tried to pray, officers mocked and ridiculed them, hollering to "Shut the fuck up!" *Id.* at 384-85. One officer referred to the detainees as "[f]ucking Muslims," while another taunted them, ordering, "Don't pray. You're praying bullshit." *Id.* Petitioner Hasty knew of these and other related abuses, yet he allowed them to continue. Indeed, he facilitated them. Compl. at ¶¶ 24, 77–78, 107, 109–10.

Respondents brought suit in the Eastern District of New York. After extended proceedings, the district court granted the DOJ Defendants' motions to dismiss in their entirety and granted the MDC Defendants' motions with respect to the communications blackout and interference with counsel. *Turkmen v. Ashcroft*, 915 F.Supp.2d 314, 358 (S.D.N.Y. 2013). Reversing, the Second Circuit held, *inter alia*, that the Respondents had alleged violations of substantive due process and equal protection by Petitioners, who were not entitled to qualified immunity. *Turkmen v. Hasty*, 789 F.3d at 265.

Judge Raggi concurred in part and dissented in part, arguing that Petitioners should be immune. *Id.* at 280-302. Subsequently, the Second Circuit, sitting *en banc*, denied a motion for rehearing by an equally divided vote. *Turkmen v. Hasty*, 808 F.3d 197 (2d. Cir. 2015). This Court granted certiorari on October 11, 2016. *Ashcroft v. Turkmen*, No. 15-1359, 2016 U.S. LEXIS 6272 (2016); *Hasty v. Turkmen*, No. 15-1363,

2016 U.S. LEXIS 6273 (2016); *Ziglar v. Turkmen*, No. 15-1363, 2016 U.S. LEXIS 6273 (2016).

## SUMMARY OF THE ARGUMENT

*Amici* agree with the Respondents and the majority below that the Petitioners are not entitled to qualified immunity. For months, Petitioners mistreated Respondents for no reason other than a discriminatory animus against Muslims and Arabs. We understand that in moments of crisis, our government may move decisively to ensure the safety of the nation. But regardless of their subjective motive, Petitioners did not act to protect national security; they acted to punish Muslims and Arabs. In this Court, Petitioners do not contend their actions were legal, and nor should they. The law has been clearly established for many years that an executive officer may not take action against a person based upon the color of their skin or their house of worship. Petitioners violated this bedrock command and cannot be immune.

In the civil context, Petitioners' determination to abuse Respondents because they were perceivably Arab or Muslim violated clearly established due process and equal protection guarantees. Regarding due process, discriminatory animus has no reasonable relation to a legitimate penal goal, and led in this case to exceedingly severe conditions of confinement that were arbitrary and purposeless. Regarding equal protection, Petitioners' policies were motivated by a discriminatory intent that indisputably had an adverse effect on Respondents.

In the wartime context, the notion that an unexamined exigency can justify discrimination has rightfully drifted to the fringes of American jurisprudential thought. The law has long since absorbed the true lesson of *Korematsu*, *Hirabayashi*, and *Yasui*: the Siren Song of national security cannot justify discrimination against a protected class without the most searching judicial inquiry. Because that inquiry has not yet occurred, the case must proceed.

Alternatively, even if the Court concludes this case presents a "novel" context, that alone does not render Petitioners immune. Historically, qualified immunity doctrine has strived to distinguish reasonable mistakes from unreasonable violations. Thus, officials who behave in a way that no reasonable officer would consider lawful do not deserve immunity, regardless of the novelty of the context. Because no reasonable officer would have considered it lawful in 2001 to discriminate against detainees merely because they were or were thought to be Arab or Muslim, Petitioners cannot be immune.

A temporary state of crisis need not become an unexamined state of nature. The Court should uphold the Second Circuit and affirm that the Constitution's spirit of equality remains robust—especially in moments of national tragedy.

## ARGUMENT

### I. SEPTEMBER 11 TRIGGERED A RAGE AGAINST MUSLIMS AND ARABS THAT PERSISTS TO THIS DAY

*Amici* recall the terror attacks of September 11, 2001, with the same mix of anger, sadness, and loss as all Americans. But no accounting of that day—historical, legal, or moral—is complete unless we also remember what followed. To forget the wrongs done in the aftermath is to risk the worst form of nationalist hagiography.

As too often happens, a great many were made to pay for the actions of a very few. In 1942, in the wartime hysteria following the bombing of Pearl Harbor, the country turned on Japanese Americans. "Japanese gardeners were said to be equipped with short-wave transmitters hidden in garden hose[s]; . . . [and a] number of anxious Californians . . . went so far as to plow up [a] field of flowers on the property of a Japanese farmer, [believing] 'the Jap . . . had grown his flowers in a way that when viewed from a plane formed an arrow pointing the direction to the airport.'" Jacobus tenBroek, et al., *Prejudice, War, and the Constitutions*70 (1954) (citing LOS ANGELES HERALD, 12/9/41; SACRAMENTO BEE, 12/17/41; SAN FRANCISCO EXAMINER, 12/29/41); *see also* Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* 32-34 (1972) ("Daniels") (discussing news reports of purported Japanese espionage and sabotage in the aftermath of Pearl Harbor).

This hysteria was followed by increasing demands that the government remove Japanese

Americans from the West Coast. *See, e.g.*, Henry McLemore, *Why Treat the Japs Well Here*, SAN FRANCISCO EXAMINER, Jan. 19, 1942 ("I am for the removal of every Japanese on the West Coast to a point deep in the interior.") On January 30, 1942, members of the West Coast Congressional delegation urged the War Department to "develop and consummate as soon as possible . . . complete evacuation and resettlement or internment of all enemy aliens and dual citizens." Yet, despite this fear, "[t]here was not one demonstrable incident of sabotage committed by a Japanese American, alien or native born, during the entire war." Daniels at 33 (internal citations omitted).

Here, as in 1942, those who shared a skin shade or religion with the attackers quickly felt the wrath of an inflamed public. Immediately after September 11, reports of hate crimes and violence against Muslims and Southeast Asians rose "exponentially." *Hate Crime Reports Up in Wake of Terrorist Attacks*, CNN, Sept. 17, 2001, http://edition.cnn.com/2001/US/09/16/gen.hate.crimes/.

By Thanksgiving 2001, well over 1,200 bias incidents had been reported against Arabs, Muslims, and South Asians. Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1261, 1261, 1266 (2004). Within six months of the attacks, the Council on American-Islamic Relations [CAIR] had received more than 1,700 reports of harassment, violence, and related discriminatory acts. Mohamed Nimer, *Muslims in America After 9-11*, J. ISLAMIC L. & CULTURE, Fall/Winter 2002, 1 at 18. According to the FBI, anti-

Muslim hate crime increased 1,600 percent between the years 2000 and 2001. Ilir Disha, James C. Cavendish & Ryan D. King, *Historical Events and Spaces of Hate: Hate Crimes against Arabs and Muslims in Post-9/11 America*, 58 SOC. PROBS. 21, 21-22 (2011).

Mosques were attacked or threatened. Nimer, *supra*, at 18. Workplace discrimination complaints soared. Muslim women feared covering their heads in public, and some asked religious scholars whether mortal fear could excuse them of the obligation to wear a head scarf. *Id.* at 19. In the summer of 2002, an 18-year-old man raped a 15-year-old girl inside a drug store while making anti-Muslim comments. *Id.* at 18. In the post-9/11 climate, this violence became "accepted as a regrettable, but expected, response to the terrorist attacks." Ahmad, *supra*, at 1262. Tellingly, prior to September 11, the law understood hate crime killings as crimes of moral depravity; after the attacks, they were viewed as crimes of passion. *Id.* at 1263.

This animosity persisted. While hate crimes against most groups remained flat or declined in the years before and after September 11, crimes against Arabs and Muslims spiked after the attacks. By 2015, they remained five times more common than they were before September 11. Christopher Ingraham, *Anti-Muslim Hate Crimes Are Still Five Times More Common Today Than Before 9/11*, WASH. POST (Feb. 11, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/11/anti-muslim-hate-crimes-are-still-five-times-more-common-today-than-before-11/?utm_term=.d0ccca22b0c0.

In 2015, hate crimes against Muslims represented roughly 13 percent of all religiously-motivated hate crime in the United States, a finding "consistent with reports from the FBI and from Arab advocacy organizations suggesting that 9/11 created a climate in which many Americans felt united against a 'new enemy.'" *Id.* In this new moment of fear and suspicion, "acts of hatred against Arabs and Muslims became 'normalized.'" Disha et al., *supra*, at 33. And this occurred before the leap in Islamophobic rhetoric and violence unleashed during the 2016 presidential campaign.[3]

In the anxious aftermath of the 9/11 attacks, pollsters tried to measure the extent of the animosity toward the "new enemy." Shortly after the attacks, 43 percent of respondents thought they would become more suspicious of Arabs; an even higher percentage believed the attacks represented the true desires and feelings of Muslim Americans toward the United States. Ahmad, *supra*, at 1298 n. 178 (citing Lisa Ferraro Parmalee, *Intergroup Relations Before and After 9/11: a Review of the Public Opinion Data* 34-38 (The Nat'l Conference for Community and Justice 2002) (summarizing various polls regarding civil liberties in the wake of 9/11)).

Unsurprisingly, many Americans began to support measures calculated to isolate and scrutinize people who "looked" Arab. Nearly six in ten Ameri-

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[3] For a more complete accounting of the anti-Muslim violence in this country since September 11, including the vitriol inspired by the 2016 election, *see* Brief of *Amici Curiae* Asian Americans Advancing Justice and Other Organizations in Support of Respondents.

cans favored intensive security checks for Arabs, and about half favored special identification cards. Nicole Davis, *The Slippery Slope of Racial Profiling: From the War on Drugs to the War on Terrorism*, COLORLINES, Dec. 2001, https://www.colorlines.com/articles/slippery-slope-racial-profiling. "Arab looking" airline passengers, including some who were South Asian and Latino, were ordered to deplane because fellow passengers and crew members refused to fly with them aboard. Sikh men were denied the right to board unless they removed their turbans. *Id.*

Before 9/11, nearly 80 percent of Americans opposed racial profiling; afterwards, 70 percent believed that racial profiling was not only acceptable, but necessary. *Id.* Other Americans favored an even more aggressive approach. According to one poll, taken days after the attacks, one in five respondents reported making comments like, "[w]e should just nuke them." Ahmad, *supra*, at 1297-98 (citing Linda J. Skitka, et al., *Political Tolerance and Coming to Psychological Closure Following the September 11, 2001 Terrorist Attacks: An Integrative Approach*, PERSONALITY & SOC. PSYCHOL. BULL. (2004)).

But as legal scholar Muneer Ahmad recalls, this was not simply the random violence of an enraged minority. As the treatment Respondents endured makes all too plain, it was "a rage shared by law." Petitioners Ashcroft, Mueller, and Ziglar deliberately conceived and implemented a plan to arrest and detain foreign-born Muslim and Arab men based solely on their real or perceived religion or ethnicity. Inside the MDC, Petitioners Hasty and Sherman deliberately subjected Respondents and others like them to abusive conditions

and gratuitous punishments. Some were held in solitary confinement, "a further terror and peculiar mark of infamy." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (quoting *In re Medley*, 134 U.S. 160 (1890)). Many more were beaten, taunted, and harassed. All were held virtually *incommunicado*. None had any connection to terrorism, a fact quickly known but just as quickly dismissed by Petitioners as irrelevant. *Turkmen v. Hasty*, 789 F.3d 218, 223 (2d. Cir. 2015).

## II. PETITIONERS TARGETED RESPONDENTS BECAUSE THEY WERE PERCEIVABLY MUSLIM OR ARAB, IN VIOLATION OF CLEARLY ESTABLISHED LAW

The core of this case is Respondents' allegation that Petitioners acted against them not because of legitimate concerns over national security, but because Respondents are, or were believed to be, Arab or Muslim. Actions taken against individuals "solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Oyama v. California*, 332 U.S. 633, 646 (1948) (internal citations omitted); *Hernandez v. Texas*, 347 U.S. 475, 478 n. 4 (1954) (internal citations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (internal citations omitted). On those few occasions when the Court has not paid sufficient heed to this maxim, both Court and country have come to regret it. Indeed, in an irony not lost on *amici*, these words—so often repeated by the Court—

first appeared in *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).[4]

Yet despite this allegation's simplicity, Petitioners claim they are immune. Significantly, Petitioners do not assert that their actions were or are legal. Rather, they argue that the "national security context" for their discrimination was "novel," and therefore their behavior did not run afoul of clearly established law in 2001. Brief for Petitioners at 31-34, 37-38, *Ashcroft v. Abbasi, et al.*, (No. 15-1359); Brief for Petitioners Dennis Hasty and James Sherman at 34-36, *Hasty v. Abbasi, et al.*, (No. 15-1363); Brief of Petitioner James W. Ziglar at 22, *Ziglar v. Abbasi, et al.*, (No. 15-1358). Petitioners are mistaken in two respects.

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[4] *Amici* confine their discussion to the actions taken by Petitioners against Respondents because they were, or were believed to be, Arab or Muslim. *Amici* recognize that the Respondents raised diverse legal claims involving distinct standards. But as the majority below recognized, Petitioners' discriminatory intent is at the core of Respondents' allegations and common to multiple claims. *See, e.g., Turkmen v. Hasty*, 789 F.3d 218 at 248 ("the challenged conditions were not simply restrictive; they were punitive: there is no legitimate governmental purpose in holding someone as if he were a terrorist simply because he happens to be, or appears to be, Arab or Muslim."); *id.* at 252-53 ("in view of our analysis of Plaintiffs' substantive due process claim against the DOJ Defendants . . . , we hold that the MDC Plaintiffs have adequately alleged an equal protection claim against Ashcroft, Mueller, and Ziglar"); *id.* at 259 ("it was clearly established at the time of Plaintiffs' detention that it was illegal [for Hasty and Sherman] to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin.").

First, they misconceive Respondents' claims. National security has been specifically excluded by Respondents' plausible and well-documented allegations. Petitioners may be able to show later that they acted for reasons other than discriminatory animus. At this point, however, the Complaint credibly indicates otherwise. This renders the qualified immunity question perfectly straightforward.

In the civil context, the law is clearly established that police officers and jailers cannot detain and mistreat prisoners based on irrelevant characteristics like religion or ethnicity. And in the wartime context, the law is clearly established that race or ethnic classifications ostensibly based on national security must be subjected to the most searching judicial scrutiny, a scrutiny that has not yet taken place.

Second, even if the case were "novel" in the way Petitioners suggest, they are still not immune, since no reasonable officer could have considered it lawful to discriminate against Respondents based on their religion or ethnicity, regardless of the context.

### A. In the Civil Context, the Law is Clearly Established That Executive Officers May Not Act Against Prisoners or Detainees Based on Their Religion or Ethnicity

Respondents have credibly alleged that Petitioners acted as they did not because they had evidence purporting to link Respondents to 9/11 or terrorism, but because of Respondents' real or perceived religion or ethnicity. This in turn led Petitioners to commit a number of constitutional torts, including violations of

equal protection and substantive due process. On the present complaint, therefore, national security is no more relevant than the fact that the abuses took place in New York rather than New Hampshire. Simply, the fact that the abuses took place during a national security investigation does not make them a legitimate part of a national security investigation.

To make this argument even plainer, suppose Respondents alleged they had been systematically raped as part of their detention at the MDC. Presumably, Petitioners would not suggest that the assaults had been a legitimate part of a national security investigation, even though they took place during a national security investigation. Likewise, a court would have no trouble concluding the rapists were unprotected by qualified immunity, despite the "novel" national security context in which the assaults took place. *See, e.g., Williams v. Prudden*, 67 Fed. Appx. 976, 2003 WL 21135681 (8th Cir. 2003) ("Any reasonable corrections officer would have known in January 1999 that sexually assaulting an inmate would violate the inmate's constitutional rights").

In short, to elevate national security as the only possible explanation for the wrongs committed, despite plausible and well-supported allegations to the contrary, examines the case through the wrong lens. Perhaps Respondents will not be able to prove their claims, but as the majority below properly recognized, to accept at this point that national security explains and excuses Petitioners' actions, to the irrefutable exclusion of other plausible and well-pled explanations, would be error. *Turkmen v. Hasty*, 789 F.3d at 244-45.

Viewed in its proper light, therefore, the case is a civil action for which the law is abundantly well settled. As the lower court correctly held, both substantive due process and equal protection prohibit a government official from taking action against a detainee simply because of his religion or ethnicity.

1. Due Process

The Fifth Amendment forbids the punitive treatment of pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16 (1979). Detainees can establish a due process violation by showing "an expressed intent to punish," *Bell*, 441 U.S. at 538, or by establishing that jailers created conditions of confinement "not reasonably related to a legitimate goal"—that is, conditions that are "arbitrary or purposeless." *Id.* at 539.

These principles are neither recent nor controversial. More importantly, they had been repeatedly applied in the Second Circuit by the time Petitioners acted in this case. This case law yielded a coherent legal regime that made it obvious due process disallowed the conditions imposed on Respondents merely because they were perceivably Arab or Muslim.

In *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981), for instance, the court of appeals held that imprisoning "healthy and non-disruptive" pretrial inmates in an over-crowded jail for more than two weeks in order to save the expense of building a new facility constituted "unconstitutional punishment." *Id.* at 104-05. Yet the deprivations in this case were in all respects more egregious, and the conditions more severe, than in *Lareau*.

In *Lareau*, the inmates were double-bunked but could leave their cells during the day, unrestrained, for an open area or recreation yard, *id.* at 100-01; here, Respondents were held in solitary confinement 23 hours a day, deprived of nearly all human contact, and left their cells only in shackles. In *Lareau*, the great majority of the plaintiffs were held for relatively brief periods, *id.* at 101-02 (nearly three-quarters of inmates spent 30 days or less in jail); here, Respondents were held for anywhere from three to eight months. In *Lareau*, the conditions were imposed to save money, a reasonable if not determinative goal for any state actor, *id.* at 104; here, the conditions were imposed because Petitioners had a discriminatory animus against Muslims and Arabs, an unreasonable goal for every state actor. Plainly, if the conditions in *Lareau* represented "unconstitutional punishment," so too did the conditions here, as Petitioners had to know at the time they acted.

2. Equal Protection

The Fifth Amendment likewise clearly prohibits a state "decision-maker" from "select[ing] or reaffirm[ing] a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). By the time Petitioners acted in this case, the Second Circuit had translated this standard into a clear legal test. Plaintiffs demonstrate purposeful discrimination by pointing to a law or policy that: (1) "expressly classifies persons on the basis of" a suspect classification; (2) "has been applied in an intentionally discriminatory manner[;]" or (3) "has an adverse effect

and . . . was motivated by discriminatory animus." *Brown v. City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) (internal quotation marks omitted).

Applying this standard yields only one result. When the DOJ Petitioners acted with discriminatory animus to merge the New York and INS lists, they ensured that Respondents would continue to be detained under draconian conditions, even though they knew there was no evidence connecting them to terrorism. This is the essence of an "adverse effect . . . motivated by discriminatory animus."

Likewise, when the MDC defendants, with discriminatory intent, referred to the Respondents as "Arabic assholes," "fucking Muslims," and "terrorists" in the same breath, *Turkmen*, 789 F.3d at 258; when they submitted a knowingly false report which insisted that they had subjected these Plaintiffs to harsh detention conditions based on their purported links to terrorism, *id.* at 256-57; and when they created and imposed exceptionally severe conditions for people they knew had no connection to terrorism, they produced an adverse effect that was "motivated by discriminatory animus."

For these reasons, the Second Circuit correctly held that Petitioners are not immune. The lower court did not struggle with this decision, nor should it have: neither the underlying law nor the facts at hand are complicated or controversial, and the straightforward application of the one to the other yields unsurprising results.

### B. Even In the Wartime Context, Executive Officers Clearly May Not Act Against Prisoners or Detainees Based on Their Religion or Ethnicity Without the Most Compelling Justification—A Showing That Has Not Been Made

Viewing this case through the lens of wartime exigencies does not change the result. Indeed, there is another period and set of cases that provide particular support for Respondents' argument. Petitioners claim the national security context of this case is somehow "novel." Unfortunately, it isn't. On the contrary, it is distressingly similar to one of the most infamous episodes in U.S. constitutional history—the WWII Japanese American Internment.

Then as now, the country was attacked without warning by a nation or individuals identified with a specific racial or ethnic group. Then as now, the nation exploded in a paroxysm of fury and bigotry. Then as now, the law shared in the rage, and the federal government conceived, designed, and implemented a program that led to the detention of innocent or innocuous people based on protected features—then, race and national heritage; now, real or perceived ethnicity or religion.

Then as now, the government protested that its actions had nothing to do with its prisoners' race or protected classifications but were undertaken solely to ensure national security. *Compare* ***Korematsu***, 323 U.S. at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military

Area because of hostility to him or his race"); *with Turkmen v. Hasty*, 789 F.3d at 265 (Judge Raggi, concurring in part and dissenting in part) (policies in this case were "propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001.")

The *Korematsu* majority's assertion, however, was forcefully belied by the dissenters in that very decision. *See Korematsu*, 323 U.S. at 233 (Murphy, J. dissenting) (Internment "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism"); *see also Hirabayashi*, 320 U.S. at 111. Moreover, as noted above, the Internment has been officially repudiated as one of the most egregious violations of our nation's civil rights and liberties in the last century. Thus, in 1976, commemorating our nation's bicentennial, President Ford formally rescinded President Roosevelt's Executive Order 9066, and implored the nation to learn from its mistakes. Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976). In 1983, after an exhaustive review of the history and taking hundreds of public testimonies across the country, a specially-empowered Congressional Commission found:

> The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it–detention, ending detention and ending exclusion–were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese

> Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan.

U.S. Comm'n on the Wartime Relocation and Internment of Civilians, Congress of 1980, *Report: Personal Justice Denied*, at 18 (1982) (emphasis added). In 1988, Congress overwhelmingly passed, and President Reagan signed, the Civil Liberties Act of 1988, which adopted CWIRC's findings and issued a formal apology to the surviving internees. 50A U.S.C. § 1989a(a).

From 1983 to 1988, a series of federal court rulings vacated the convictions imposed on *amici's* fathers for defying the military orders that implemented the Internment. After considering the evidence, the lower courts found that in order to secure favorable judicial rulings, the government's highest officers deceived the courts, including this Court, through a deliberate campaign of suppression, misrepresentation, destruction and alteration of critical evidence demonstrating the overwhelming loyalty of the Japanese American people to this nation. *Korematsu*, 584 F. Supp. 1406; *Hirabayashi*, 828 F.2d 591 and 627 F. Supp. 1445; Order, *Yasui*, D. Or. Crim. No. C 16056, at 2. For their courageous stands against official racism and in defense of the Constitution, *amici's* fathers were each presented with the Presidential Medal of Freedom in 1998 (Fred Korematsu), 2012 (Gordon Hirabayashi) and 2015 (Minoru Yasui). https://www.whitehouse.gov/blog/2014/01/30/honoring-legacy-fred-korematsu; https://www.whitehouse.gov/campaign/medal-of-freedom.[5]

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[5] For an extensive examination of these cases, *see* Eric K. Yamamoto, et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 221-310 (2013); Peter Irons,

Not surprisingly, many government officials repudiated and regretted their roles. *See, e.g.*, *Personal Justice Denied* at 18. Indeed, Chief Justice Warren, who forcefully advocated for the removal of Japanese Americans while California Attorney General, later "deeply regretted" his role in that tragedy:

> I have since deeply regretted the removal order and my own testimony advocating for it, because it was not in keeping with our American concept of freedom and the rights of citizens . . . It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts.

Warren, *The Memoirs of Earl Warren* 149 (1977) (emphasis added).

Accordingly, the fact that the Court upheld the exclusions in *Korematsu*, *Hirabayashi*, and *Yasui* provides no comfort to Petitioners. Like *Scott v. Sanford*, 60 U.S. 393 (1856) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), the wartime exclusion cases are part of the American "anticanon"—those cases "that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). It comes as no surprise,

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*Justice Delayed: The Record of the Japanese American Internment Cases* 3-46 (1989).

therefore, that the Court and many of its members have denounced these cases, particularly *Korematsu*. *See id.* at 459-60 (collecting some of the repudiations by modern Supreme Court Justices). Indeed, the extent to which the wartime cases have been repudiated by the Court and its members may explain why none of the Petitioners rely on the decisions to support their actions.

To be sure, the interned Japanese Americans had done no wrong, while Respondents had committed minor immigration violations. Likewise, the wartime cases involved exclusion and long-term detention in desolate military camps, while the present case involves relatively shorter detentions under different severe conditions in an urban federal jail. But these are distinctions without a difference. The fact that Respondents may have been lawfully arrested does not legitimate all that followed, and nothing in the offense for which Respondents were arrested even plausibly justified the treatment they endured.

Likewise, no one credibly suggests that the cautionary admonition embodied in the rejection of the wartime cases should be read narrowly or confined to its facts. For that reason, we would consider it extraordinary for any executive officer to assert that *Korematsu*, *Hirabayashi*, and *Yasui* authorized subjecting a different group (say, Muslims) to a different set of abuses (say, prolonged solitary confinement) based on a different protected characteristic (say, ethnicity or religion), simply because they had overstayed their visas and were subject to lawful arrest. Nor would we expect the government to maintain that the illegality of such an action had not been

"clearly established." Thankfully, we do not need to wait for another *Korematsu* to recognize such an argument as incorrect.

Petitioners may theoretically be able to prove that their actions were legitimate. But before that judgment can be made, Petitioners' justification must be subjected to searching judicial scrutiny. As the Court recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507, 525, 530-531 (2004), "careful examination" is necessary in light of the very real "risk of erroneous deprivation of a citizens' liberty in the absence of sufficient process." The Court cited the lesson of "history and common sense" that "an unchecked system of detention carries the potential to become a means of oppression and abuse." *Id.* at 530 *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) ("Any retreat from the most searching judicial inquiry can only increase the risk of another such error [as in *Korematsu*] occurring in the future.")[6]

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[6] *Amici* respectfully disagree with the suggestion in *Adarand* that the Court subjected the government's asserted rationale for the Internment to the "most rigid scrutiny." *See* Yamamoto, et al., *Race Rights and Reparation* 410 (describing the "Court's deferential approach" that "signaled a hands-off role in reviewing alleged government war power excesses, including those detrimental to the most fundamental of democratic liberties"). Indeed, in granting Fred Korematsu's *coram nobis* petition, Judge Marilyn Hall Patel eloquently captured *Korematsu*'s perhaps most important lesson:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitu-

On the present record, when there has been no judicial inquiry, much less the "searching inquiry" demanded by the Court, the risk of "another such error" is far too great. The clearly established lesson of the wartime cases, therefore, is that the lower court must be affirmed; the case must proceed.

## III. Because No Reasonable Officer Would Have Considered It Lawful to Target People Based on Their Religion or Ethnicity, Petitioners Are Not Entitled to Qualified Immunity, Even If the Context Were Novel

Petitioners cannot be immune even if the Court were to conclude the context here was "novel" in some relevant respect. In the half century since the Court announced the qualified immunity doctrine, it has never intimated that a "novel" setting, by itself, is sufficient to warrant an officer's immunity. On the contrary, the Court has consistently tied immunity to the behavior demanded of a reasonable officer. This jurisprudence yields an easily applied standard that the Court may adopt: An official who acts in a way that no reasonable officer would have considered lawful cannot be immune, regardless of whether the context

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> tional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms, our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

*Korematsu*, 584 F. Supp. at 1420.

is "novel." The case should then be remanded to the lower courts for application of the standard.

### A. The Qualified Immunity Doctrine Developed to Protect Reasonable Mistakes and is Not Distinct From the Demands Placed on a Reasonable Officer

The history of qualified immunity cannot be understood apart from the parallel history of 42 U.S.C § 1983. *See Pierson v. Ray*, 386 U.S. 547, 554-58 (1967); *cf. also Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("[t]he qualified immunity analysis is identical under [§ 1983 and *Bivens*]"). In relevant part, § 1983 renders liable "every person" who, under color of law, deprives another of the "rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (1986). Though the statute traces its lineage to the Civil Rights Act of 1871, it fell into almost immediate disuse until 1961, when the Court allowed individuals to sue state officers for violations of the Constitution that had not been sanctioned by the state itself. *Monroe v. Pape*, 365 U.S. 167 (1961); *Developments in the Law—Section 1983 and Federalism* (pt. 1), 90 HARV. L. REV. 1133, 1169 (1977).

Once *Pape* affirmed the right to sue state officials for constitutional violations, § 1983 became—and remains—the most important litigation weapon in the civil rights arsenal. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980) (§ 1983 liability imposed for bribing a judge to obtain an injunction); *Graham v. Connor*, 490 U.S. 386 (1989) (police officers liable under § 1983 for handcuffing, withholding treatment from, and injuring a diabetic entering a sugar coma); *Hudson v. McMillian*, 503 U.S. 1 (1992) (corrections officers

liable under § 1983 for beating a handcuffed and shackled inmate, loosening his teeth, and cracking facial bones).

But § 1983 also became the most popular litigation weapon. From 1966 to 1987, the number of civil rights actions increased nearly 2,000 percent. Douglas A Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 936 (1990). And by 1995, § 1983 claims comprised around 10 percent of all federal civil suits. Roger A. Hanson & Henry W. K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* iii (1995). This deluge seemed to indicate that the lower courts were reading the statute too broadly, and that executive officers risked liability even for reasonable mistakes.

The Court first tried to stem this tide in *Pierson v. Ray*, 386 U.S. 547 (1967), which involved the arrest of a group of clergymen in Jim Crow Mississippi. The Petitioners sued the officers, alleging they had been arrested without probable cause. The lower court denied defendants' motion to dismiss, reasoning that *Pape* had eliminated immunity doctrines. *Pierson*, 386 U.S. at 550-51. The Court reversed, holding that police officers were immune from damages for an unlawful arrest if they believed, reasonably and in good faith, in the legality of their actions at the time. *Id.* at 557. Seven years later, the Court extended *Pierson* to all executive officers, making them liable only for unreasonable or ill-willed constitutional violations. *Schuer v. Rhodes*, 416 U.S. 232 (1974).

But the "good faith immunity" test also proved inadequate. The lower courts became inundated with

"insubstantial" claims of constitutional wrong that survived pretrial motions based on alleged bad faith by executive officers. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Because bad faith is almost invariably a question of fact, qualified immunity ceased to protect reasonable mistakes by executive officers. *Id.* at 816-18.

In response, the Court replaced the subjective "good faith" standard with an ostensibly objective inquiry into notice, *i.e.*, that the legal principle the plaintiff relied on had been "clearly established" at the time the officer acted. *Harlow*, 457 U.S. at 801. Although observing that a government officer could not "reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful," *id.* at 818, the Court has also made clear that a right is clearly established when its "contours" are "sufficiently clear" to a reasonable officer. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Applying this standard, the Court has consistently immunized reasonable mistakes. In *Wilson v. Layne*, 526 U.S. 603 (1999), for instance, law enforcement officials allowed a photographer to accompany them during the execution of an arrest warrant, where he photographed the Petitioner during the protective sweep, though the pictures were never published. *Id.* at 607-08. Although deciding that the "media ride-along" ran afoul of the Fourth and Fourteenth Amendments because it violated the "sanctity of the home," *id.* at 610, 614, the Court also held that the officers were immune

because the illegality was not immediately apparent, and a reasonable officer could not have been expected to know the Court would interpret the Constitution as it did, *id.* at 615.

On the other hand, the Court has just as consistently refused to immunize behavior that no reasonable officer would have considered lawful. In *Groh v. Ramirez*, 540 U.S. 551 (2004), for example, a police officer relied on a warrant that failed to specify the items to be seized, in violation of the particularity requirement of the Fourth Amendment. The Court held that the officer was not entitled to qualified immunity. "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 563-64.

In summary, the history of the qualified immunity doctrine reveals the Court's consistent attempt to balance the plaintiff's sword against the defendant's shield. Whenever the former has become too powerful, the Court has strengthened the latter to ensure that executive officials are not punished for their reasonable choices. At the same time, the Court has never allowed qualified immunity to protect conduct that no reasonable officer would have considered lawful. The qualified immunity doctrine has always tried to strike a balance that imposes accountability for unreasonable violations while protecting reasonable mistakes, regardless of the context in which the viola-

tion arose. *E.g.*, *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments").

Ignoring this history, Petitioners argue that "clearly established" means factually identical, without regard to whether the violation would have been obvious to any reasonable officer. Petitioners Ashcroft and Mueller, for instance, fault Respondents for failing to identify "any decision indicating, much less clearly establishing as of late 2001, that continuing to apply the hold-until-cleared policy to aliens on the New York list was so arbitrary or purposeless to national security as to be unconstitutional." Brief for Petitioners at 33, *Ashcroft v. Abbasi, et al.*, (No. 15-1359) (internal citations omitted). Of course, the hold-until-cleared policy and the New York list did not exist prior to late 2001. Under Petitioners' theory, no conduct, regardless of how unreasonable, could overcome a qualified immunity defense.

This is emphatically not the law. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *United States v. Lanier*, 520 U.S. 259, 269 (1997) (right can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights").

Contrary to Petitioners' argument, the Court has never suggested that a bare assertion of "novelty" can

immunize behavior that no reasonable officer would have considered lawful. Rather, the Court has always carefully tethered the permissible scope of qualified immunity to the conduct expected of a reasonable executive official. This connection was explicit in the good faith immunity standard of *Pierson* and *Schuer*. *Pierson*, 386 U.S. at 555; *Schuer*, 416 U.S. at 247-48. But it did not disappear when the Court adopted the "clearly established" test.

In *Anderson*, for instance, the Court explained that the "clearly established" standard exists to immunize behavior that "reasonably could have been thought consistent with the rights they are alleged to have violated," and emphasized that a right is clearly established if "every reasonable official would have understood that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 648. Likewise, in *Saucier v. Katz*, the Court indicated that the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." 533 U.S. 194, 202 (2001).

Though the Court has strongly hinted at this test, it has never explicitly adopted it. The Court should take this opportunity to clarify that officials cannot be immune if at the time they acted no reasonable officer would have considered it lawful to do as they did. Courts use the "no reasonable person" benchmark frequently and the more generic "reasonable person" is a nearly ubiquitous element of American jurisprudence. Thus, there should be no confusion or additional learning curve in its application.

In addition, the standard will ensure that no officer can lose immunity "as long as their actions reasonably could have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 648. This was the Court's main concern in developing the qualified immunity doctrine, and a concern that will be more consistently protected under the proposed rule than under the current regime of ad hoc analogy.

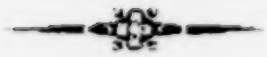
### B. If Adopted, The Court Should Remand for Application of the "No Reasonable Person" Standard

Because a new standard involving factual considerations should be applied in the first instance by the lower courts, the Court should remand for application of the "no reasonable person" standard. Should the Court wish to apply it, however, the outcome is clear: No reasonable officer would have considered it lawful to act against Respondents simply because they are perceivably Arab or Muslim, and Petitioners cannot be immune.

Thus, Ashcroft, Mueller, and Ziglar should not receive qualified immunity from the due process claims because they authorized the merger of the New York List and the INS List, resulting in detention under the "most restrictive conditions" of individuals who were of no interest to the FBI. It beggars belief to suggest that a reasonable officer would have believed in late 2001 that the law allowed her to detain people in whom the FBI had no interest under the sort of conditions that prevailed in this case. For the same reason, these Petitioners cannot be immune from the equal protection claims.

No reasonable officer could have believed people could be held for continued detention and mistreated solely because they appeared to be Muslim or Arab.

Nor should Hasty and Sherman be immune. They deliberately created and maintained exceedingly severe conditions of confinement, including long-term solitary confinement, despite knowing that Respondents violated no regulation, posed no risk, and had no connection to terrorism. No reasonable officer would have believed in late 2001 that it was appropriate to subject detainees to the ADMAX SHU's harsh conditions solely on account of a detainee's religion or ethnicity.



## CONCLUSION

The judgment of the court of appeals in favor of Respondents should be affirmed.

Respectfully submitted,

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In the
# Supreme Court of the United States

JAMES W. ZIGLAR,
*Petitioner,*
v.
AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

JOHN D. ASHCROFT, former Attorney General, *et al.*,
*Petitioners,*
v.
AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

DENNIS HASTY, *et al.*,
*Petitioners,*
v.
AHMER IQBAL ABBASI, *et al.*,
*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF MEDICAL AND OTHER SCIENTIFIC AND HEALTH-RELATED PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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## INTEREST OF *AMICI CURIAE*

Amici are a group of medical and other scientific and health-related experts from the United States and numerous other countries with extensive experience studying the psychological and physiological effects of solitary confinement and other punitive conditions of incarceration.[1] Amici have spent decades documenting these health effects and advocating on behalf of prisoners before courts, legislatures, and international and foreign legal bodies. Amici include a member of the United Nations Subcommittee for the Prevention of Torture, experts from the World Health Organization and World Psychiatric Association, preeminent psychologists and psychiatrists specializing in the effects of solitary confinement, prison health services experts and monitors, neuroscientists, physicians, and medical professors.[2]

Amici's commitment to evaluating and addressing the health effects of solitary confinement gives them a strong interest in the resolution of this case, in which Respondents seek damages to redress

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[1] Amici obtained written consent to file their brief from Petitioners and Respondents, copies of which accompany this submission, as required by Rule 37.3(a). Amici state in accord with Rule 37.6 that this brief was not authored, in whole or in part, by counsel for any party. Further, no monetary contribution to the preparation or submission of this brief was made by any person or entity other than Amici and their counsel.

[2] A detailed identification of the nineteen Amici appears in Appendix A.

their indefinite and prolonged detention in solitary confinement solely based on their race or religion and the commission of immigration infractions. Based on decades of study, experience, and advocacy, Amici are uniquely positioned to discuss the medical and other scientific and health-related literature, international legal standards, and foreign laws regarding the use of solitary confinement as imposed in this case.

Accordingly, Amici respectfully submit this brief in support of Respondents to detail the established, well-documented, and exhaustive medical and other scientific and health-related research, spanning decades and countries, that virtually unanimously concludes that prolonged solitary confinement, for more than a few weeks, inflicts profound psychological and physiological damage on inmates, or in this case, detainees held without charge. Moreover, as Amici explain below, because of the intense pain and suffering caused by solitary confinement, international legal standards and the laws of other countries restrict its use to a measure of last resort, and would prohibit its use under the circumstances of this case. Amici urge this Court to hold similarly.

## BACKGROUND

The term "solitary confinement," as used in the international medical and legal literature and throughout this brief, refers to "the confinement of prisoners for 22 hours or more a day without meaningful human contact." G.A. Res. 70/175, Rule 44 (Dec. 17, 2015) ("Mandela Rules"); *see also* Craig

Haney, *Mental Health Issues in Long Term Solitary and "Supermax" Confinement*, 49 Crime & Delinq. 124, 125-27 (2003) ("Haney, *Mental Health Issues*") (defining solitary confinement as an inmate's "physical[] segregat[ion] from the rest of the prison population" and lockdown in a tiny cell of usually no more than 80 square feet for 23 hours or more per day); Juan E. Méndez, Interim report of the Special Rapporteur of the Human Rights Council on torture & other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/66/268, 8 (Aug. 5, 2011) ("Méndez 2011 Report") ("solitary confinement" is "the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day"); Am. Psych. Ass'n, *Position Statement on Segregation of Prisoners with Mental Illness*, 2 (2012) ("APA Position Statement") ("segregation units . . . [have] one to two inmates in a cell").

Cells used for solitary confinement are "designed to minimize human contact and environmental stimulation." Am. Pub. Health Ass'n, *Solitary Confinement as a Public Health Issue*, 1 (Nov. 5, 2013), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue ("APHA, *Solitary Confinement*"). Accordingly, prisoners in solitary confinement routinely are deprived of almost all meaningful perceptual, social, and occupational stimulation, including natural light, most or all personal property, and almost all human interaction (which is vital to maintain a sense of identity and grasp of reality), except that which "occurs through bars or . . . slots in solid metal doors." *Id.* They also are denied access

to vocational, educational, and recreational programs. Haney, *Mental Health Issues* at 127.

The use of solitary confinement—particularly the kind of segregated housing unit ("SHU")[3] or "supermax" facility in which Respondents were housed in 2001-2002—has exploded over the past several decades across the United States. In 2000, "there were approximately 20,000 prisoners confined to supermax-type units in the United States." *Id.* at 125. By 2016, that number multiplied to "approximately 80,000 inmates . . . held in some form of isolation in state and federal prisons on any given day." National Commission on Correctional Health Care *Position Statement: Solitary Confinement (Isolation)*, 1 (Apr. 2016) ("NCCHC, *Position Statement*").

The Respondents in this case were placed in solitary confinement, in a federal SHU facility, even though they had not been charged with—much less convicted of—any crime. Fourth Amended Complaint & Demand for Jury Trial, *Turkmen v. Ashcroft*, 02-cv-2307 (E.D.N.Y. Sept. 3, 2010), ECF No. 726 ("Compl.") at ¶¶ 4, 52. Picked up in the weeks following September 11th, they were detained and isolated solely because they were non-citizens who were, or were perceived to be, Arab or Muslim and had committed civil immigration infractions. *Id.* ¶¶ 1, 29, 43. Although there was no individualized evidence that they had terrorist ties, they were held indefinitely in solitary confinement for 2.5 to 8

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[3] Throughout this brief, Amici employ the same abbreviations used in Respondents' Brief.

months in each case, until the federal government ultimately cleared them. *Id.* ¶¶ 1, 41, 142, 152, 170, 174, 188, 200, 211, 217-18, 227, 234, 237.

The extreme and punitive conditions to which Respondents were subjected squarely qualify as the kind of "prolonged" solitary confinement—*i.e.*, "longer than 3 to 4 weeks"—known to inflict severe health consequences. NCCHC, *Position Statement*, at 1. Each detainee was confined to a "tiny cell[]" for "at least 23 hours a day," alone or with one other detainee, for months on end.[4] Compl. ¶¶ 5, 76, 163, 182, 188, 211, 234. The cells were completely "bare"; no property, not "even toilet paper" or "other personal hygiene items," were kept in the cells. *Id.* ¶¶ 76, 103, 130. "[B]right lights were kept on in the cells . . . 24 hours a day," causing sleep deprivation, and the cells were "very cold at night." *Id.* ¶¶ 76, 119, 223. For the first month, the detainees were "denied all recreation" outside their cells and subjected to a "communications blackout" forbidding "any social or legal visits or telephone calls." *Id.* ¶¶ 79, 122. Even after the bans were lifted, the detainees were deterred from recreation by the extreme cold in the outdoor recreation "cages," subjected to grossly humiliating mandatory strip-searches, suffered abuse in transport, and were routinely denied the weekly legal calls and monthly social calls technically permitted. *Id.* ¶¶ 83, 111-18, 122.

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[4] Three of the six remaining Respondents were confined *alone* for all or part of their months in the SHU: Benatta for 5 months, Bajracharya for 2 months, and Khalifa for 1.5 months. Compl. ¶¶ 182, 188, 206, 212, 234.

Thus, the facts and circumstances of the Respondents' arrest and detention, combined with the conditions imposed on them during such detention, maximized their social isolation and all but eliminated environmental stimuli and meaningful activity. These conditions "exert[ed] maximum pressure" on them, and were designed specifically to inflict pain and suffering and, ultimately, to "'break[]'" them. *Id.* ¶¶ 61, 77.

## SUMMARY OF ARGUMENT

The wealth of medical and other scientific and health-related research examining the consequences of prolonged use of solitary confinement overwhelmingly concludes that it inflicts profound psychological damage. Studies across nations and decades conclude that the social isolation, sensory deprivation, and extreme idleness inherent in solitary confinement is psychologically toxic and deprives inmates of the basic human needs to function. This leads to dramatic mental deterioration, even in previously healthy individuals.

As a result, an inordinately high percentage of inmates in solitary confinement exhibit a set of psychopathologies which many medical professionals describe as unique and not present in any other syndrome. These symptoms include difficulties with thinking and memory, stupor, obsessional thinking, inability to tolerate external stimuli, hallucinations, and, in extreme cases, a delirium with associated psychotic symptoms. As a result of the psychological toll, inmates in solitary confinement disproportion-

ately engage in high rates of self-mutilation and suicide. Even for those eventually released, the damage is often permanent.

Medical research also documents that prolonged solitary confinement can inflict grave physiological harms. As with psychological symptoms, reports of physical symptoms are consistent across decades and countries and include serious sleep disturbances, profound lethargy, dizziness, and deterioration of cardiac, musculoskeletal, gastrointestinal, and genitourinary function. The extreme deprivations of solitary confinement may even alter the physical structure of the brain. Again, the physiological damage is often permanent.

In recognition of the severe pain and suffering inflicted by prolonged solitary confinement, international legal institutions have condemned its use for over 15 days as cruel and inhuman treatment and, in some cases, as torture. Moreover, international bodies limit even short-term solitary confinement to a measure of last resort. They do not permit its use on the basis of race or religion or for immigration infractions. Laws of many other countries reflect these international legal restrictions on the use of solitary confinement, including, for example, the laws of England and Wales, Germany, France, Austria, Hungary, Finland, Ireland, Canada, Australia, Japan, China, and Argentina. Thus, both international legal standards and the laws of other countries prohibit the use of indefinite, prolonged solitary confinement under the circumstances of this case.

This country's laws likewise forbid the imposition of extreme and punitive conditions of confinement for discriminatory reasons and without sufficient cause, just as the Second Circuit held below. *See* Opinion, at 32, *Turkmen v. Hasty*, No. 13-981 (2d. Cir. Jun. 17, 2015), ECF No. 266. Upholding those laws is imperative not simply to redress the harms suffered by Respondents but to clarify the law going forward. Given the current political climate and rhetoric broadly connecting immigrants with the specter of terrorism, this Court's decision will have direct implications for the treatment of non-citizens in this country in the years to come. For these reasons, Amici respectfully request that the Court affirm the decision below and permit Respondents to pursue their constitutional challenges to the extreme and punitive conditions of their confinement.

## ARGUMENT

### I. The Medical and Other Scientific and Health-Related Literature Establishes that Solitary Confinement Causes Severe Psychological and Physiological Harms

#### A. Research Demonstrates that Solitary Confinement Causes Grave Psychological Damage

The extensive research conducted in prison systems throughout the United States and in many other countries is "remarkably consistent" in its findings that prolonged solitary confinement inflicts "deleterious psychological effects." Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel & Far Too Usual Punishment*, 90

Ind. L. J. 741, 756 (2015) ("Bennion, *Banning the Bing*"); *see also* Hernán Reyes, *The worst scars are in the mind: psychological torture*, 89 Int'l Rev. of the Red Cross, No. 867, 591, 607 (Sept. 2007) ("Being confined for prolonged periods of time alone in a cell has been said to be the most difficult torment of all to withstand."). In fact, "[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies." Kenneth Appelbaum, *Am. Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. Am. Acad. Psychiatry & L. 406, 410 (2015) ("Appelbaum, *Abolish Solitary*"). When inmates are subjected to solitary confinement for longer periods—*i.e.*, months, years, or decades—the risks of profound, permanent psychological damage skyrocket. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. of L. & Pol'y 325, 346 (2006) ("Grassian, *Psychiatric Effects*").

The direct link between solitary confinement and severe psychological harm has been "convincingly documented" in many countries since the nineteenth century. Int'l Psychol. Trauma Symp., *Istanbul Statement on the Use & Effects of Solitary Confinement*, 2 (Dec. 9, 2007), http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf. ("Istanbul Statement"). For example, between 1854 and 1909, 37 reports in Germany alone identified solitary confinement as the central cause of psychotic illness among prisoners. Sharon Shalev, *A Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, London School of Economics

and Political Science, 10 (Oct. 2008) ("*Sourcebook*"). This documented correlation led German officials to call for reform of the use of solitary confinement. *Id.* England likewise reformed its solitary confinement policies in the nineteenth century after documenting extraordinary increases in psychological disturbances among isolated prisoners. *See* U.R.Q. Henriques, *The Rise & Decline of the Separate System of Prison Discipline, Past & Present*, 86 (1972). Studies from Canada, Denmark, Norway, South Africa, and Switzerland, as well as several communist nations during the Cold War, recorded similar substantial increases in the prevalence of psychiatric health problems among isolated prisoners. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 481-87 (2006) ("Smith, *Effects of Solitary*").

The well-established psychological harms inflicted by solitary confinement are a direct result of its inherent characteristics: "isolation" from other people, lack of meaningful perceptual stimulation, and extreme "idleness" resulting from the denial of any productive activities. *See* Terry Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment's Sake?*, Routledge Handbook of Int'l Crime & Just. Stud., 5-6 (2013) ("Kupers, *Isolated Confinement*"). As explained by Dr. Terry Kupers, "[h]uman beings require at least some social interactions and productive activities to establish and sustain a sense of identity and to maintain a grasp on reality." *Id.* at 6. When a person is deprived of meaningful social contact and activity, "unrealistic ruminations and beliefs cannot be tested" and "are transformed into unfocused and

irrational thoughts." *Id.* "[D]eprived of a sufficient level of environmental and social stimulation, individuals will soon become incapable of maintaining an adequate state of alertness and attention to the environment." Grassian, *Psychiatric Effects*, at 331. This inability to concentrate can render isolated prisoners unable to read or watch television even when such pastimes are permitted (and they often are not). Smith, *Effects of Solitary* at 490. "Internal impulses" grow to "overwhelming proportions," without check, and "[d]isorganized behaviors emerge." Kupers, *Isolated Confinement*, at 5.

Recognizing the direct link between solitary confinement and the harms it causes, experts advise that "the inherent restriction in meaningful social interaction and environmental stimulation and the lack of control adversely impact the health and welfare of *all who are held in solitary confinement*." NCCHC, *Position Statement*, at 2 (emphasis added). Even previously healthy, stable inmates—not just those with preexisting mental illness—predictably will deteriorate psychologically in prolonged isolation. Grassian, *Psychiatric Effects*, at 332; APHA, *Solitary Confinement* at 2 ("Prisoners in long-term solitary confinement are subject to significant mental suffering and deterioration."). After all, "[t]he psychological distress and suffering caused by solitary confinement" is often the reason for doing it, "not an unintended side effect." *See* Appelbaum, *Abolish Solitary*, at 410.

Inmates subjected to the profound stresses of solitary confinement exhibit a "strikingly consistent" set of "psychiatric symptoms," recorded in decades of case studies, articles, and personal accounts. Ben-

nion, *Banning the Bing* at 757; *see also* Smith, *Effects of Solitary*, at 488 ("[A] significant percentage of prisoners subjected to solitary confinement suffer from a similar range of symptoms irrespective of differences in the physical conditions in various prisons and in the treatment of isolated inmates." (collecting studies)).

Dr. Craig Haney, a preeminent expert on the psychological harms of solitary confinement, has catalogued these harms: "anxiety," "panic," "withdrawal," "hypersensitivity," "ruminations," "cognitive dysfunction," "hallucinations," "loss of control," "irritability," "aggression, and rage;" "paranoia;" "depression," "a sense of impending emotional breakdown," "self-mutilation," and "suicidal ideation and behavior." Haney, *Mental Health Issues* at 130-31 (collecting dozens of studies); *see also* Bennion, *Banning the Bing* at 757. "Even those without a prior history of mental illness" are at serious risk of developing these precise symptoms. NCCHC, *Position Statement*, at 2 (listing virtually identical symptoms).

The same catalogue of psychological disturbances is recorded in studies from several countries. Smith, *Effects of Solitary*, at 488-93 (listing dozens of studies on the prevalence of "[o]versensitivity to stimuli," a "state of confusion," "severe problems with th[e] ability to concentrate," "hallucinations," "paranoia," "violent reactions, and self-mutilation"). German studies from the nineteenth century described isolated prisoners suffering from delusions, vivid hallucinations, and psychosis. *Sourcebook*, at 10. Studies in Northern Ireland and the Soviet Union likewise have found that isolated prisoners

commonly experienced hallucinations. Lawrence E. Hinkle & Harold G. Wolff, *Communist Interrogation & Indoctrination of "Enemies of the State,"* AMA Archives of Neurology & Psychiatry, 128 (1956); T. Shallice, *The Ulster Depth Interrogation Techniques & Their Relation to Sensory Deprivation Research*, 1 Cognition 385, 390, 396 (1972). Isolated prisoners in one Norwegian study, and others, reported "perceptual distortions," hearing voices and frequent violent fantasies. Smith, *Effects of Solitary*, at 491 (citing Jan Stang et al., *Fanger i sikkerhetscelle—en utfordring.* Tidsskrift For Den Norske Lægeforening, 1844, 1846 (2003)).

Dr. Stuart Grassian, who has conducted detailed studies of what some consider the "strikingly unique" set of psychological symptoms caused by solitary confinement, has concluded that they are "suggestive of a discreet illness." Grassian, *Psychiatric Effects*, at 337. Indeed, some of the symptoms described above are found in virtually no other neuropsychiatric illness. *See id.* Dr. Hans Toch drew similar conclusions interviewing hundreds of segregated prisoners in New York, reporting that a syndrome he called "'isolation panic' was a serious problem among prisoners in solitary confinement." Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. of L. & Soc. Change 477, 518 (1997) ("Haney, *Regulating Prisons*").

Moreover, medical studies spanning decades consistently report that a troublingly high percentage of isolated inmates suffer from some or all of these characteristic psychological disturbances. The

Istanbul Statement, prepared by the International Psychological Trauma Symposium, reported that as many as 90% of isolated prisoners suffer adverse symptoms ranging from confusion to hallucinations to psychosis. Istanbul Statement at 2. Others have noted the "alarming frequency" of even the most extreme behavior in conditions of solitary confinement, like "violent reactions[] and self-mutilation." Smith, *Effects of Solitary*, at 492.

Dr. Grassian's 1983 study of isolated inmates at Walpole, Massachusetts, provides one striking record of the prevalence of psychopathology in solitary confinement. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1453 (1983) ("Grassian, *Psychopathological Effects*"). Half of the interviewed inmates suffered from "difficulties with thinking, concentration, and memory"—with a quarter reporting "acute confusional states." *Id.* Two-thirds exhibited "hyperresponsivity to external stimuli." *Id.* at 1452. Half had experienced "hallucinations," such as "hearing voices," and "perceptual distortions," like seeing "[t]he cell walls start wavering." *Id.* Two-thirds suffered from "massive free-floating anxiety," while nearly half experienced obsessive thoughts like "primitive aggressive fantasies" and "persecutory fears." *Id.* at 1453.

Dr. Haney consistently reported "extraordinarily high rates of symptoms of psychological trauma" in his study of segregated prisoners in a supermax facility at Pelican Bay, California. Haney, *Regulating Prisons*, at 524. More than 80% suffered from anxiety, confused thinking, obsessive thoughts, "over-sensitivity to stimuli, irrational anger, and

social withdrawal." *Id.* Over half suffered from hallucinations and perceptual distortions," "fear[ed] impending nervous breakdowns," and reported "violent fantasies" and "emotional flatness." *Id.*

A study by the Correctional Association of New York ("CANY") reported similarly high percentages of psychiatric deterioration among inmates housed in either single-cell or double-cell disciplinary lockdown. CANY, *Mental Health in the House of Corrections: A Study of Mental Health Care in New York State Prisons*, 1-2 & n.2, 54-59 (2004) ("CANY, *Mental Health*"). The researchers recounted: "On nearly every site visit, and in some lockdown units more than others, we encountered individuals in states of extreme desperation: men weeping in their cells or pacing about like caged animals; men who had smeared feces on their bodies or lit their cells on fire; prisoners who cut their own flesh in a form of self-directed violence known as self-mutilation; inmates who rambled incoherently or expressed paranoid delusions . . . ." *Id.* at 54.

The psychological harms documented in these studies are consistent with those experienced by Respondents. Bajracharya "we[pt] constantly" during his confinement, thought he was "going crazy," reported suicidal thoughts, and "scream[ed] to guards that he was going to die." Compl. ¶ 241. Benatta was so distraught over his "inexplicable, prolonged, and arbitrary confinement" that he twice attempted to injure – or possibly kill – himself by repeatedly banging his head into the walls or bars of his cell. *Id.* ¶¶ 179-82. On another occasion, he used a plastic spoon to cut himself. *Id.* ¶ 206.

The psychological trauma inflicted by solitary confinement results in extraordinarily high rates of self-harm, as compared to the general population. CANY, *Mental Health* at 58-59 (finding that 40% of isolated inmates reported self-harm). In a 2014 study of New York City jails, Dr. Homer Venters, Chief Medical Officer of New York City correctional health services, reported that "[a]lthough only 7.3% of admissions included any solitary confinement, 53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-harm occurred within this group." Fatos Kaba et al., *Solitary Confinement & Risk of Self-Harm Among Jail Inmates*, 104 Am. J. of Pub. Health 442, 442 (2014). This analysis of 244,699 incarcerations revealed that exposure to solitary confinement increased the odds of experiencing self-harm by 6.89 times and potentially fatal self-harm by 6.27 times. *Id.*

The suicide rate is disproportionately high among inmates in solitary confinement as compared to the general population. Alison Liebling, *Prison Suicide & Prisoner Coping*, 26 Crime. & Just. 283, 309 (1999). Recent studies of the United States prison system report that "of all successful suicides that occur in a correctional system, *approximately fifty percent* involve the *3 to 8 percent* of prisoners who are in some form of isolated confinement at any given time." Kupers, *Isolated Confinement*, at 6 (emphasis added); *see also* Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 Correctional Mental Health Rep., 1 (2011); Heriberto G. Sánchez, *Suicide Prevention in Administrative Segregation Units: What Is Missing?*, 19 J. of Correctional Health Care 93, 95 (2013).

Other countries likewise report disproportionately high suicide rates among isolated prisoners. A 2002 Danish study found that prisoners in isolation had a suicide rate *twelve times* that of the general population. Smith, *Effects of Solitary*, at 498 (citing Sigurd Benjaminsen & Birgit Erichsen, *Selvmordsadfærd Blandt Indsatte*, 16 Copenhagen: Direktoratet for kriminalforsorgen (2002)). In Finland, one third of suicides took place in isolation. Matti Joukumaa, *Prison suicide in Finland, 1969-1992*, 89 Forensic Sci. Int'l, 167 (1997). In Norway between 1956 and 1991, *three-quarters* of all prison suicides were committed by prisoners in solitary confinement, which comprised only a quarter of the prison population. Smith, *Effects of Solitary*, at 499-500. A German study of Bavarian prisons between 1945 and 1974 concurs that prison suicide most commonly occurred "in solitary confinement." W Spann et al., *Suizide in bayrischen Vollzugsanstalten,* Münchener medizinische Wochenschrift, 315-16 (1979).

Finally, medical research shows that even after inmates are eventually released from prolonged solitary confinement, they may continue to suffer psychological damage "severe enough to cause near permanent mental and emotional damage." Elizabeth Vasiliades, *Solitary Confinement & Int'l Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 Am. U. Int'l L. Rev. 71, 76-77 (2005). Due to long-lasting psychological effects, some prisoners held in solitary confinement have serious difficulty returning to society (or even to the general prison population). *See* Ida E. Koch, *Isolationens psykiske og sociale følgevirkninger*, 60 Månedsskrift for Praktisk Lægegerning, 382 (1982) ("Koch, *Isola-*

*tionens*")) (reporting that post-isolation prisoners in Denmark experienced enormous anxiety around other people, to the degree that some voluntarily prolonged their isolation).

The "lasting mental health implications" of pathologies developed in prolonged isolation include the inability to initiate or control behavior or interact with other people, loss of one's sense of self and control over emotions, and withdrawal into a fantasy world. Haney, *Mental Health Issues* at 138-41. Because prolonged solitary confinement transforms inmates' personalities, they subsequently grapple with an altered self-image on a daily basis, as well as overwhelming feelings of inadequacy, "invalidating stigmas, relived abuse, uncontrollable paranoia or anxiety, self-imposed seclusion, [and] difficulties with sexual intimacy." Joane Martel, *Solitude & Cold Storage: Women's Journeys of Endurance in Segregation*, Elizabeth Fry Soc'y of Edmonton, 87 (1999). One Canadian study found that over 50% of formerly isolated prisoners experienced at least some of these long-term psychological impairments. *Id.* at 85-86. "Those who are not blessed with special personal resiliency and significant social and professional support needed to recover from such atypical and traumatic experiences may never return to the free world and resume normal, healthy, productive social lives." Haney, *Mental Health Issues* at 141.

Similarly, the Respondents in this case "continue[] to suffer" the "emotional and psychological effects of [their] detention" long after their release. Compl. ¶¶ 154, 171, 193, 228. Several have trouble with concentrating, communicating, trusting others, sleeping, studying, and finding work and some have

lost their homes, businesses, or jobs. *Id.* ¶¶ 171, 193, 213, 228, 244. Respondents now face numerous long-term and potentially permanent mental health issues, including post-traumatic stress disorder, depression, anger, isolation, fear of travel, difficulties handling open areas or light, and an inability to enjoy life. *Id.* ¶¶ 193, 213, 228, 244. The medical literature resoundingly confirms that Respondents' experience of this long-term psychological damage directly resulted from their prolonged solitary confinement.

### B. Research Additionally Demonstrates that Solitary Confinement Causes Serious Physiological Damage

The deleterious health effects of solitary confinement are not only psychological. Experts have found numerous "corresponding physiological consequences" among inmates subjected to solitary confinement. Carnagie Fujio et al., Physicians for Human Rights, *Buried Alive: Solitary Confinement in the U.S. Detention System*, 1-2 (April 2013) ("*Buried Alive*").

The physiological damage caused by isolation has been documented by researchers in numerous countries since the nineteenth century. *Id.* For example, in Denmark in the 1860s, shortly after the new Vridsløselille Penitentiary opened, "it became apparent that serious health problems had arisen" among prisoners held in isolation there. Smith, *Effects of Solitary*, at 461-62; Peter Scharff Smith, *Isolation & Mental Illness in Vridsløselille 1859-1873: A New Perspective on the Breakthrough of the*

*Modern Penitentiary*, Scandinavian J. of Hist., 4-9, 12-13, 15-16, 29 (2004). Even though the prisoners "were typically described as healthy upon their entrance to the prison," "at least a third of the inmates reacted to isolation with adverse health effects," including a "total lack of energy" and "physical laxity." Smith, *Effects of Solitary*, at 461-62. German studies from the nineteenth century likewise reported severe health effects among isolated prisoners. *Id.* at 466 (recounting a German prisoner's description of "how absolute isolation had 'a very injurious effect on the body and mind'").

Medical experts have confirmed that physiological harms "can occur after only a few days in solitary confinement and the health risks rise with each additional day spent in such conditions." Expert Rep. of Juan E. Méndez, at ¶¶ 56, 62, *Ashker v. Governor of the State of Cal.*, No. 09-cv-5796 (N.D. Cal. Mar. 6, 2015) ("Méndez Expert Report") (citing Istanbul Statement). The litany of physiological symptoms associated with solitary confinement, even for a short period of time, include insomnia, headaches, lethargy, dizziness, heart palpitations, appetite loss, weight loss, severe digestive problems, diaphoresis (*i.e.*, profuse sweating), back pain, joint pain, deteriorated vision, shaking, chills, and aggravation of preexisting medical problems. *Buried Alive* at 1-2; *see also* Grassian, *Psychopathological Effects*, at 1450 (reporting that isolated prisoners in the 1983 Walpole study suffered from numerous physical symptoms, including gastrointestinal, cardiovascular, and genitourinary problems, migraine headaches, and profound fatigue).

The same collection of physiological symptoms has been reported throughout medical studies in many countries. Sharon Shalev, a human rights advocate and criminologist in the United Kingdom, has found that isolated inmates consistently report symptoms nearly identical to those recorded by American researchers. *Sourcebook*, at 15. Several Canadian studies of isolated prisoners confirm these same physiological symptoms, as well as others like pains in the abdomen, pains and pressure in the chest, and fainting. *See, e.g.*, Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada*, 67 (1983). The World Health Organization ("WHO") lists a virtually identical group of serious physiological symptoms resulting from solitary confinement. Stefan Enggist et al., WHO Regional Office for Europe, *Prisons & Health*, 28 (2014) ("WHO, *Prisons & Health*") (listing "gastrointestinal and genitourinary problems; diaphoresis; insomnia; deterioration of eyesight; lethargy, weakness, [and] profound fatigue; feeling cold, heart palpitations; migraine headaches; back and other joint pains; poor appetite, weight loss, diarrhea; tremulousness; [and] aggravation of preexisting medical problems").

These characteristic physiological symptoms are highly prevalent among inmates, including previously healthy individuals, held in isolation. *See* Méndez Expert Report, at ¶ 56 ("a significant number of individuals [in isolation] will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of preexisting personal factors.") (quoting Istanbul Statement). Dr. Haney's 1993 Pelican Bay study, for example, revealed that more than 80% suffered from

headaches, lethargy, and troubled sleep. Haney, *Mental Health Issues* at 133. Over 50% experienced loss of appetite, dizziness, nightmares, heart palpitations, and perspiring hands. *Id.* Dr. Haney has likened the constellation of physical symptoms of solitary confinement to those of hypertension. *Id.*

Other studies in the United States and elsewhere confirm the high prevalence of physiological damage among prisoners held in long-term solitary confinement. In Dr. Haney's 2013 re-interview of prisoners from the Pelican Bay study, 100% suffered from headaches, lethargy, troubled sleep, and dizziness, while over 70% still reported nightmares, heart palpitations, and perspiring hands. Expert Rep. of Craig Haney, at 62, 84, *Ashker v. Governor of the State of Cal.*,, No. 09-cv-5796 (N.D. Cal. Mar. 12, 2015). A 2014 North Carolina study similarly reported that, out of 51 prisoners interviewed, 41 suffered headaches; 38 had problems sleeping; 19 had heart palpitations; 24 experienced dizziness; and 25 experienced appetite and weight loss. Mark Bowers et al., *Solitary Confinement as Torture*, U. of N.C. Sch. of L. Immigration/Human Rights Clinic, 69 (2014). A Danish study concluded that *nearly all* isolated prisoners "suffer after days or a few weeks of nervous symptoms" including "lack of ability to sleep" and "psychosomatic symptoms." Smith, *Effects of Solitary*, at 484 (citing Koch, *Isolationens*, at 382).

These physiological symptoms directly result from the inherent characteristics of solitary confinement. For example, Dr. Kupers observed the negative effects of the absence of natural light in solitary

confinement in a 2014 study at the Eastern Mississippi Correctional Facility. Expert Rep. of Terry A. Kupers, E. Miss. Correctional Facility, at 17 (June 16, 2014), https://www.aclu.org/sites/default/files/assets/expert_report_of_terrry_kupers_with_table_of_contents.pdf. As Dr. Kupers explained, inmates held in solitary may lose normal diurnal rhythm—the steady alteration of day and night—after inadequate exposure to natural light. *Id.* Because diurnal rhythm orients a person in time and enables fundamental biological processes of the body, its loss causes significant sleep deprivation, with attendant physiological and psychological deterioration. *See id.*[5]

In this case, the Respondents endured constant artificial lighting and could not even manufacture darkness by covering their faces. Compl. ¶ 119. They were deprived of meaningful access to the outdoors for exercise or natural light. *See, e.g., id.* ¶¶ 122-27, 178. All of the Respondents were deprived of sleep—some for days on end. *Id.* ¶¶ 121, 181, 206. This persistent lack of sleep caused "substantial physical and emotional distress." *Id.* at ¶ 121. It was after a bout of sleepless nights, for example, that Benatta "snapped" and began banging his head against the bars of his cell. *See id.* ¶¶ 181-82, 206. He does not remember "what he was think-

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[5] Sleep deprivation "greatly exacerbates the tendency to suffer psychiatric breakdown and become suicidal[;]" "creates fatigue[,] and magnifies cognitive problems, memory deficits, confusion, anxiety, and sluggishness." Kupers Expert Report, at 17.

ing, or whether he was trying to kill himself." *Id.* 182.

Many studies also show that sensory deprivation during solitary confinement has corrosive effects on brain functioning. *Sourcebook*, at 19-20. Researchers have used electroencephalograms ("EEGs"), which record electrical activity in the brain, to study isolated prisoners' brain waves. Grassian, *Psychiatric Effects*, at 330-31. These tests reveal that "even a few days of solitary confinement will predictably shift the [EEG] pattern toward an abnormal pattern characteristic of stupor and delirium." *Id.* Canadian studies recorded similar results among isolated prisoners, who exhibited a "slowing of EEG [and] alpha frequency." G.D. Scott et al., *Changes in EEG Alpha Frequency & Evoked Response Latency During Solitary Confinement*, 79 J. of Abnormal Psych., 54, 54 (1972). Lethargic conditions have been described by researchers in connection with "a complete breakdown or disintegration of the identity of the isolated individual." Smith, *Effects of Solitary*, at 492.

Further, studies strongly suggest that solitary confinement can fundamentally alter the structure of the human brain in profound and permanent ways.[6]

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[6] While direct studies of the impact of solitary confinement on prisoners' brains have not been possible due to experimental challenges, evidence from human and animal studies inform an understanding of the brain mechanisms that underlie the observed symptoms in prisoners who have been isolated for protracted periods. *See* ACLU, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, 6 (Aug. 2014),

Dr. Huda Akil, a neuroscientist and specialist in the effects of emotions and stress on brain structure and function, reports that *each* key characteristic of solitary confinement—lack of physical activity, meaningful interaction with others and the natural world, and visual stimulation—"is by itself sufficient to change the brain . . . dramatically, depending on whether it lasts briefly or is extended," even just for days. Kate Allen, *Researchers Study Effects of Prolonged Isolation Among Prisoners*, The Toronto Star (Feb. 14, 2014), https://www.thestar.com/news/world/2014/02/14/researchers_study_effects_of_prolonged_isolation_among_prisoners.html.

Dr. Akil has summarized many neurobiological studies that reveal that certain regions of the brain of people who experience extreme psychological stress (like those in solitary confinement) literally diminish in volume because the neural cells become shriveled. *See* ACLU, *Briefing Paper*, at 6. Dr. Akil's research aligns with decades of experimental studies on mammals demonstrating the neurological harms of isolation and sensory deprivation. ACLU, *Briefing Paper*, at 6. For example, a study at the University of California-Berkeley showed that rats in supermax-style cells had fewer neurological connections and thinner cerebral cortexes—the brain's "grey matter" that controls perception, language, planning, movement, and social cues. *Id.*

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https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf ("ACLU, *Briefing Paper*").

This neurological damage, and other physiological harms inflicted by solitary confinement can be long-lasting, even permanent. Several studies conclude that the decline in brain activity that occurs in solitary confinement, as confirmed by EEGs, can be irreversible if isolation is prolonged, as it was in this case. *Sourcebook*, at 20; *see also* Grassian, *Psychiatric Effects*, at 325. Various international bodies have stressed that "all forms of solitary confinement without appropriate mental or physical stimulation are likely in the long term to have damaging effects." European Committee for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *Rep. to the Gov't of Denmark on the visit to Denmark carried out by the CPT, from Jan. 28–Feb. 4, 2002*, 20 (Sept. 25, 2002), http://www.cpt.coe.int/documents/dnk/2002-18-inf-eng.pdf; *see also* WHO, *Prisons & Health*, at 31.

In sum, notwithstanding the pervasive use of solitary confinement in the United States, the consensus among experts is that solitary confinement, as imposed on Respondents in this case, inflicts serious and often long-lasting physiological harm.

## II. International Legal Standards and the Laws of Other Countries Prohibit the Imposition of Solitary Confinement Under the Circumstances of This Case

International law has long prohibited the cruel and inhuman treatment of prisoners, including in the 1948 United Nations ("U.N.") Universal Declaration of Human Rights, G.A. Res. 217A(III) (Dec. 10, 1948) ("UDHR"); the 1976 U.N. International Covenant on Civil and Political Rights, G.A. Res.

2200A(XXI) (Mar. 23, 1976) ("ICCPR"); and the 1984 U.N. Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984) ("CAT"). Moreover, international bodies recognize that solitary confinement qualifies as cruel and inhuman treatment unless applied in strictly limited circumstances and for a strictly limited duration. The Mandela Rules, as well as the Office of the High Commissioner for Human Rights ("OHCHR") Manual on the Effective Investigation & Documentation of Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment (1999) ("Istanbul Protocol"), embody the recent iterations of these well-settled international law principles. These standards for the use of solitary confinement likewise are reflected in the laws of many countries.

Under such standards, the use of solitary confinement was impermissible in this case because it was (i) based on religion or race, (ii) based on the pretext of immigration violations, and (iii) used as a measure of first, not last, resort. Moreover, even if the use of solitary confinement had been justified—which it was not—the indefinite, prolonged duration and extreme conditions endured by Respondents likewise violated international laws.

Since World War II, international conventions have prohibited cruel and inhuman treatment, as well as torture. In 1948, the UDHR dictated that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment." UDHR art. 5. The 1976 ICCPR and the CAT—to which the United States is a party—contain identical prohibitions. *See*

ICCPR art. 7; CAT art. 2 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

"Torture" and "cruel and inhuman treatment" both refer to "the infliction of 'severe physical or mental pain or suffering.'" Int'l Comm. of Red Cross, *Customary IHL - Rule 90, Torture & Cruel, Inhuman or Degrading Treatment*, 1, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90. Torture, however, additionally, is inflicted or justified for "a specific purpose," like "obtaining . . . information or a confession" or "any reason based on discrimination of any kind." *Id.* at 2; CAT art. 1. Both of those purposes motivated the imposition of solitary confinement in this case. Compl. ¶¶ 1, 61, 77.

Human rights bodies applying these international laws "have found violations of the prohibition of inhuman treatment" in cases of solitary confinement, particularly when prolonged and extreme, as occurred in this case. *Customary IHL - Rule 90* at 2. For example, the Inter-American Court of Human Rights ("IACHR") held that "prolonged isolation and deprivation of communications are in themselves cruel and inhuman treatment" because they are "harmful to the psychological and moral integrity of [a] person" and violate "inherent dignity as a human being." *Velasquez-Rodriguez v. Honduras*, Inter-Am.

Ct. H.R. (ser. C), No. 4, ¶ 156 (July 29, 1988). The European Court of Human Rights has found that "complete sensory isolation, coupled with total social isolation, can destroy the personality" and thus "constitutes a form of inhuman treatment" in violation of international law. *Ilaşcu v. Moldova & Russia*, Application No. 48787/99, Eur. Ct. of H.R. (2004).

The international prohibition on extreme, prolonged solitary confinement was restated most recently in the U.N.'s 2015 Mandela Rules. These "minimum standards" for "detention of prisoners" require that "all prisoners shall be protected from[] torture and other cruel, inhuman or degrading treatment or punishment, *for which no circumstances whatsoever may be invoked as a justification.*" Mandela Rules at 1 (emphasis added). The Mandela Rules squarely prohibit "solitary confinement" as "amount[ing] to torture or other cruel, inhuman or degrading treatment or punishment"—unless imposed under strictly limited circumstances. *Id.* at 43.

Under these international standards, Respondents' placement in solitary confinement for *any* duration was illegal, first because solitary confinement cannot be imposed based on race or religion. In 1969, the International Convention on the Elimination of All Forms of Racial Discrimination "condemn[ed] racial discrimination" and guaranteed "[t]he right to equal treatment before the tribunals and all other organs administering justice." *See* G.A. Res. 2106, Int'l Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1), 5(a) (Jan. 4, 1969). The U.N.'s prior version of the Standard

Minimum Rules for the Treatment of Prisoners in place in 2001-2002, required that standards for incarceration "be applied impartially." U.N. Congress on the Prevention of Crime & the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners at 6 (May 13, 1977) ("1977 U.N. Rules"). Thus, "[t]here shall be no discrimination on grounds of race, . . . religion . . . national or social origin, . . . or other status." *Id.* This rule applied equally to "all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to 'security measures' . . . ." 1977 U.N. Rules at 4(1). The current Mandela Rules likewise dictate that "[t]here shall be no discrimination" in the application of prison standards "on the grounds of race, . . . religion, . . . [or] national or social origin." Mandela Rules at 2.

Consistent with this international legal standard, many other countries prohibit the discriminatory treatment of prisoners based on their religion or race. *See, e.g.*, Law No. 24.660, July 8, 1996 (*Ley de Ejecución de la Pena Privativa de la Libertad n° 24.660*), Argentina (requiring that rules governing prison sentences be applied without discrimination based on race, religion, or other circumstances); Fundamental Law of Hungary (2011), art. XV(2) (guaranteeing fundamental rights, including to Hungarian prisoners, without discrimination based on race or religion); Canadian Charter of Rights & Freedoms, Part I of the Constitution Act, 1982 § 15 (providing equal protection and banning religious discrimination); Racial Discrimination Act 1975 (CTH) s 10, Australia (providing people of any "race, colour or national or ethnic origin" the right to

equality before the law); *Jones v Scully* (2002) 120 FCR 243, [111-113] (holding that ethno-religious groups, such as Muslims, constitute protected groups under the Racial Discrimination Act); *Naen v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 216, [72] (same).

Yet, here, the Respondents were placed in isolated confinement precisely because of their religion and faced religious discrimination throughout detention. Respondents were routinely physically and verbally accosted for being Muslim, and were consistently deprived of the ability to observe their faith. *See* Compl. ¶¶ 66, 103, 109, 117, 131-39. For example, the Respondents were denied access to the Koran, religiously appropriate food, and the means to maintain their daily prayer requirements. *Id.* ¶¶ 128, 132-39, 261. Indeed, the Respondents were often punished for praying. For instance, one received an incident report for refusing to stand up for count during prayer, while others were unable to obtain razors or hygienic supplies (which guards purposely passed out during prayer times). *Id.* ¶¶ 135, 138.

International law further articulates that discriminatory treatment will not be excused even in a time of national emergency, like September 11th. The ICCPR, which prohibits inhuman treatment, provides that "[i]n time of public emergency" a state may "derogate[e] [its] obligations under the present Covenant to the extent strictly required by the exigencies of the situation, *provided that such measures . . . do not involve discrimination solely on*

*the ground of race, . . . religion or social origin.*"[7] ICCPR art. 4(1) (emphasis added); *accord* U.N. Human Rights Comm., General Comment No. 29, States of Emergency (Article 4) ¶ 8 U.N. Doc. No. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

Additionally, while the government in this case used the pretext of immigration violations to detain Respondents, international legal standards forbid the imposition of solitary confinement on *that* basis as well. "[I]mmigration detention, and conditions and treatment of detained migrants, [must] comply with international human rights law." U.N. OHCHR Opening Remarks on "Human Rights of Migrants in Detention Centres," 12th Sess., H.R. Council (Sept. 19, 2009). Under international human rights law, "[administrative] detention of migrants on the grounds of their irregular status should under no circumstances be of a punitive nature." Francois Crépeau, Rep. of Special Rapporteur on Human Rights of Migrants ¶ 31, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012). Thus, immigrants in detention "should not be subject" to "highly restricted movement, lack of outdoor recreation and lack of contact visitation"—all of which occurred in the extreme solitary confinement at issue here. *Id.* The U.N.'s principles on arbitrary detention similarly require that a detained immigrant "must have the possibility, while in custody, of communicating with the outside world" and "must be informed of . . . any

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[7] In accordance with this international principle, China forbids discrimination based on religion or territory even in cases involving terrorism. Anti-Terrorism Law of People's Republic of China, art. 6 (2016).

possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure." OHCHR, Rep. of the Working Grp. on Arbitrary Detention, Civ. & Pol. Rights, Annex II, Principles 1-5, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999). The placement of detained immigrants into solitary confinement violates these principles.[8]

The OHCHR recently reiterated that international law prohibits prolonged solitary confinement for immigrant detainees, even if based on suspicion of terrorism. "'[T]he use of 'administrative detention' under public security legislation [or] *migration laws* . . . resulting in [the] deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is *not* compatible with international human rights law." OHCHR, Compilation of Deliberations of Working Grp. On Arbitrary Detention, Delib. No. 9, ¶ 73, U.N. Doc. No. A/HRC/22/44 (Dec. 24, 2012). The OHCHR observed that such "administrative detention is particularly worrying as it

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[8] Consistent with these international legal principles, Argentina forbids the use of solitary confinement as punishment for violations of immigration laws. Law No. 25.871, Jan. 20, 2004 (*Ley de Ejecución de la Pena Privativa de la Libertad* N° 25.8714), art. 82 & L. N° 25.871, art. 70, Argentina. Recognizing that immigration detention should not be punitive, England and Wales prohibit "special accommodation" (*i.e.*, solitary confinement) for punishment, except as a "temporar[y]" measure for as long as a detainee is "refractory or violent." The Detention Centre Rules, 2001 SI 2001/238, Rule 42(1), England and Wales ("Detention Centre Rules").

increases the likelihood of solitary confinement, acts of torture and other forms of ill-treatment"—precisely what occurred in this case.[9] *Id.*

Additionally, the imposition of solitary confinement was unlawful in this case because it was used as a measure of first resort. International law requires that solitary confinement be used only "as a last resort." Mandela Rules at 45(1). In other words, solitary confinement "shall not be imposed by virtue of a prisoner's sentence" in the first instance. *Id.*; *see also* G.A. Res. 45/111, Principle 7 (Dec. 14, 1990). Instead, international law contemplates the limited use of "[p]unishment by close confinement" solely as a "disciplin[ary]" measure for prisoners who break prison rules. 1977 U.N. Rules at 32(1).

Many countries apply this same "last resort" principle by refusing to impose solitary confinement as part of an initial sentence and permitting it solely based on some *additional*, enumerated factor arising after the individual is detained. *See, e.g.*, Detention Centre Rules, at 40, 42 (imposing isolation only to control violent behavior or in interest of security or safety); Prison Act of 16 March 1976, amended by

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[9] Indeed, the Istanbul Protocol specifically includes among its "list of torture methods" solitary confinement and the accompanying conditions that were imposed in this case, such as "a small or overcrowded cell . . ., exposure to extremes of temperature, denial of privacy . . . [d]eprivation of normal sensory stimulation . . ., abuse of physiological needs, restriction of sleep, food, water, toilet facilities, bathing, motor activities, medical care, social contacts . . . [and] loss of contact with the outside world." Istanbul Protocol ¶ 145(m)-(n) (2004).

art. 7, Act of 25.04.2013 §§ 88-89, Germany (allowing isolation based on additional factors such as prisoner's behavior, mental state, danger of escape or violent attack, or danger of suicide or self-harm); Australian Human Rights Commission, *Human rights standards for immigration detention,* § 3.7 (2013) ("Australian Human Rights Standards") (same); Ordinance for Treatment of Detainees, art. 18 (1981), Japan (same); Imprisonment Act (767/2005), "Vankeuslaki" ("Finland Imprisonment Act") Ch. 18, Finland (permitting isolation only to prevent harm to prisoner or others, escape, drug use, drug-related offenses, or similar situations); Prison Rules 2007 (SI252/2007), Rules 62-64, Ireland (basing isolation on factors such as whether individual is at "imminent" risk of harming himself); Irish Prison Act (2007), part 3 (allowing isolation for violating prison disciplinary code); Anhalteordnung Detention Regulation [BGBl. II Nr.] No. 128/1999, as amended, BGBl. II Nr. 439/2005, § 5, Austria (basing solitary confinement on factors such as violence against other inmates, risk of infection, or disruption); *Ogiamien v. Ontario*, 2016 ONSC 3080 (Canada); *R. v. Hamm*, 2016 ABQB 440 (Canada) (finding segregation illegal when lacking rational explanation or where penitentiary did not establish absence of viable alternative); *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805 (Canada) (same); *Grenier v. R.*, 2004 FC 132 (same); *Circulaire du 14 avril 2011 relative au placement à l'isolement des personnes détenues* NOR: JUSK1140023C, France (allowing isolation only when impossible to otherwise protect detainees or facility); Australian Human Rights Standards § 3.7 (providing for isolation as a last resort and where necessary to avoid serious and imminent

threat of self-harm, injury, or destruction of property).

Furthermore, the immediate use of isolation was particularly troubling in this case because Respondents had not been convicted or even charged with a crime. International law recognizes that "[s]olitary confinement of unconvicted individuals . . . is potentially harmful" because it can "coerce the detainees and force them to self-incriminate or to provide any type of information." Inter-American Commission on Human Rights, Rep. on the Use of Pretrial Detention in the Americas, Doc. 46/13, OEA/Ser.L/V/II., ¶ 280, (2013); *see also* Méndez 2011 Report ¶ 73 ("When solitary confinement is used intentionally during pretrial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture . . . or to cruel, inhuman, or degrading treatment").[10]

Even if the use of solitary confinement could have been justified in this case, its duration was unjustifiable and violated international legal standards. International law prohibits "[i]ndefinite" and

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[10] *See also Essex paper 3: Initial guidance on the interpretation & implementation of the Nelson Mandela Rules, Ch. 5. Restrictions, discipline & sanctions*, U. of Essex-Human Rights Centre, at 13 (Apr. 2016) (solitary confinement may not be used "intentionally for purposes such as punishment, intimidation, coercion or obtaining information or a confession, or for any reason based on discrimination" (quoting Juan E. Méndez, Interim Report of the Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 60, U.N. Doc. A/68/295 (Oct. 7, 2013))).

"[p]rolonged" solitary confinement as "amount[ing] to torture or other cruel, inhuman, or degrading treatment or punishment." Mandela Rules at 43. As explained by the Special Rapporteur, "[t]he feeling of uncertainty when not informed of the length of solitary confinement exacerbates the pain and suffering of the individuals who are subjected to it." Méndez 2011 Report ¶ 59. And, "the longer the duration of solitary confinement . . . the greater the risk of serious and irreparable harm." *Id.* ¶ 58. International law defines prolonged solitary confinement as "a time period in excess of 15 consecutive days," a limit far exceeded in this case. Mandela Rules at 44.[11]

The extreme isolation and sensory deprivation imposed on Respondents likewise violated international standards for the conditions of solitary confinement. International law forbids placement in a

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[11] Similarly recognizing the pain and suffering inflicted by prolonged solitary confinement, many countries limit its duration to relatively short time periods. *See, e.g.*, Detention Centre Rules, at Rule 40(3) (capping isolation for immigration detainees at 24 hours, with extension to three days, upon authorization from Secretary of State); Finland Imprisonment Act, Ch. 15 § 8 (10-day cap, after which prisoner cannot be isolated again for seven days); Correctional Services Act 1982 (SA) s 36(3), Australia (30-day cap); Prisons Act 1981 (WA) s 43(1) (same); Corrective Services Act 2006 (QLD) s 53(2) (same); Corrections Management Act 2007 (ACT) s 90(8) (same); Law of the People's Republic of China on Administration of Embarkation and Disembarkation, arts. 59-60 (2013) (30-day cap, with extension to a maximum of 60 days upon additional approval).

"constantly lit cell," as occurred in this case, as "inhuman" treatment. Mandela Rules at 43(1). Moreover, under the 1977 U.N. Rules in place in 2001-2002, prisoners must be allowed regular communication with family and "reasonable facilities to communicate with the diplomatic and consular representatives of [their] State." 1977 U.N. Rules at 37-38(1); Mandela Rules at 62. "[U]ntried prisoner[s]" must be allowed "visits from [] legal adviser[s]." 1977 U.N. Rules at 93; Mandela Rules at 61(a).[12] Thus, the complete social isolation and communications blackout used in this case likewise was in violation of international law.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in Respondents' brief and in the other *amicus* briefs filed in support of Respondents, Amici respectfully submit that this Court affirm the Second Circuit's decision and permit Respondents to litigate their constitutional challenges to the punitive treatment they suffered in solitary confinement.

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[12] Other countries similarly regulate the conditions of solitary confinement to moderate the degree of social isolation and sensory deprivation. *See, e.g.*, Finland Imprisonment Act, Ch. 15 § 8 (permitting inmates in isolation to keep their possessions and receive visitors); *Id.* at Ch. 11, § 3 (guaranteeing Finnish prisoners the right to religious observance); Corrective Services Regulation 2006 (QLD) § 5, Australia (guaranteeing isolated prisoners access to personal items, appropriate clothing, and reticulated water, and exercise in fresh air).

Respectfully submitted,

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December 22, 2016

# APPENDIX

## APPENDIX A

*Amici curiae* are the following nineteen individuals:

1. Huda Akil, Ph.D., is a Gardner Quarton Distinguished University Professor of Neuroscience and Psychiatry and Co-Director and Senior Research Professor of the Molecular and Behavioral Neuroscience Institute at the University of Michigan. Research in Dr. Akil's laboratory is focused on understanding the neurobiology of emotions, including pain, anxiety, and depression. Dr. Akil also served as a past President of the Society for Neuroscience, the largest neuroscience organization in the world, and has been elected a member of the National Academy of Sciences.

2. Scott Allen, M.D., F.A.C.P., is a Professor of Medicine and Vice Chair of the Clinical Division at the University of California, Riverside. He also is the co-founder and co-director of the Center for Prisoner Health and Human Rights at The Miriam Hospital. He serves as medical advisor to Physicians for Human Rights ("PHR") on its work to stop torture and was lead medical author of PHR's reports "Experiments in Torture," "Aiding Torture," and "Leave No Marks." He served seven years as a full-time physician for the Rhode Island Department of Corrections, acting as the department's medical program supervisor between 2001 and 2004.

3. Bradley Brockmann, Esq. is the Executive Director for the Center for Prisoner Health and Human Rights at The Miriam Hospital. The Center is affiliated with Brown University and raises

awareness at the national and state level about healthcare issues and other justice-involved populations. He designs and teaches courses focused on Prisoner Health at the School of Public Health at Brown University. Mr. Brockman also worked as a civil rights attorney with Prisoners' Legal Services of Massachusetts.

4. Robert L. Cohen, M.D., is a clinical instructor at the New York University School of Medicine. He has been appointed numerous times by federal courts and the Department of Justice to monitor health care in U.S. prisons. Dr. Cohen's recent presentations address the impact of solitary confinement on prisoner health, the health care of detained immigrants, and protection of the civil rights of detained persons.

5. Stefan Enggist is a Senior Project Manager in Switzerland's Federal Office of Public Health. Previously, he was the Technical Officer of Health in Prisons at the World Health Organization's Regional Office for Europe in Copenhagen, Denmark.

6. Joe Goldenson, M.D., is a physician who served as the Director and Medical Director for Jail Health Services for the San Francisco Department of Public Health for twenty-eight years. Dr. Goldenson also served as Assistant Clinical Professor at the University of California, San Francisco from 1980 to 2015, and has worked extensively as a correctional health medical expert and court monitor of inmate medical care in U.S. jails. He also served as a medical expert and monitor retained by federal district courts in various cases. Mr. Goldenson is the Ameri-

can Public Health Association's representative to the Board of the National Commission on Correctional Health Care ("NCCHC").

7. Stuart Grassian, M.D., is a psychiatrist who taught at Harvard Medical School for almost thirty years. He has numerous publications and extensive experience evaluating the psychiatric effects of stringent conditions of confinement, including the psychiatric syndrome resulting from deprivation of social, perceptual, and occupational stimulation in solitary confinement.

8. Craig Haney, Ph.D., is a social psychologist and Distinguished Professor of Psychology at the University of California, Santa Cruz ("UCSC"). Dr. Haney is also the Director of the program in Legal Studies at UCSC and the UCSC Presidential Chair. Dr. Haney is noted for his numerous publications, including five books, and his work on the study of the psychological impact of solitary confinement and prison isolation. Dr. Haney has served as an expert witness in several federal court cases related to the prison environment and punishment, and he has testified before the Subcommittee on the Constitution, Civil Rights and Human Rights of the U.S. Senate Judiciary Committee.

9. Terry A. Kupers, M.D., is a Professor at the Wright Institute and psychiatrist with a background in psychoanalytic psychotherapy, forensics and social and community psychiatry. He has provided expert testimony in several large class action litigations concerning jail and prison conditions, and he provides consultation and staff training on the psychological effects of prison conditions, including

solitary confinement. Mr. Kupers has published several books and articles and is a consultant to Human Rights Watch.

10. Shane O'Mara is Professor of Experimental Brain Research at Trinity College, Dublin (Personal Chair), and Principal Investigator and Director of the Trinity College Institute of Neuroscience. He has published more than 110 peer-reviewed papers, including on brain systems affected by stress, anxiety, depression, and motivation, and wrote the book *Why Torture Doesn't Work: The Neuroscience of Interrogation.*

11. Hernán Reyes, M.D., is a Senior Research Fellow at the Human Rights Center at the University of California, Berkeley. He is also the former medical coordinator for Health in Prisons for the International Committee of the Red Cross ("ICRC"), a post he occupied from 1984-2012. Dr. Reyes documented prison health, as well as ill-treatment, human rights violations, and torture for the ICRC in more than 45 countries around the world during his 28 years with ICRC. Since 1991, he has been medical Observer for the ICRC to the World Medical Association ("WMA") and its Ethics Committee, working closely with the WMA on many ethical issues of concern in prisons.

12. Josiah D. Rich, M.D., M.P.H., is a Professor of Medicine and Epidemiology at the Warren Alpert Medical School of Brown University. He also is a practicing Infectious Disease Specialist at the Rhode Island Department of Corrections. Dr. Rich has written close to 190 peer-reviewed publications, predominantly concerning the overlap between

infectious diseases, addictions, and incarceration. He is the Director and co-founder of the Center for Prisoner Health and Human Rights and also is a Co-Founder of the Centers for AIDS Research's nationwide initiative on collaboration in HIV in corrections.

13. Barry H. Roth, M.D. is a forensic psychiatrist who has performed forensic torture survivor evaluations for twenty years. Mr. Roth is a member of Physicians for Human Rights; Program in Psychiatry and Law, Harvard Medical School; World Psychiatric Association Section on Psychological Consequences of Torture & Persecution; and the International Forum of Teachers of the UNESCO Chair in Bioethics. Mr. Roth is a Distinguished Life Fellow of the American Psychiatric Association and Massachusetts Psychiatric Society. He also is an instructor of the Harvard Law School Trial Advocacy Workshop and former Harvard Medical School instructor.

14. Pau Perez-Sales, M.D., a psychiatrist, is the Chair of the Section on Psychological Consequences of Persecution and Torture of the World Psychiatric Association. He is the founder of a number of groups dedicated to addressing the medical care of victims of torture and has served as an independent consultant and forensic expert in national and international courts for victims of abuse and torture. Dr. Perez-Sales was also the founding member and president of the Human Rights Section of the Spanish Association of Neuropsychiatry and is an elected member of the Board of the International Society for Health and Human Rights ("ISHHR") and the Section on Torture of the World Psychiatric Association ("WPA").

15. Peter Scharff Smith, Ph.D., is an Associate Professor in the Department of Criminology and Sociology of Law at the University of Oslo. He also is a Professor in Criminology in the Department of Sociology and Social Work at Aalborg University. He has numerous publications concerning the use and effects of solitary confinement on prison inmates.

16. Pablo Stewart, M.D., is a Clinical Professor of Psychiatry at the University of California, San Francisco School of Medicine. He has over thirty years of experience working in the criminal justice system, including serving for ten years as a federal-court-appointed psychiatric expert on the effects of solitary confinement on the mental health of inmates.

17. Nora Sveaass, Ph.D., is a psychologist and Associate Professor at the Department of Psychology at the University of Oslo. Her research, publications, and professional experience have focused on human rights violations, the psychological consequences of torture and violence, and the treatment and rehabilitation of victims of torture and violence. Dr. Sveaass served two terms on the United Nations Committee against Torture from 2005 to 2013 and is currently a member of the United Nations Subcommittee for the Prevention of Torture.

18. Homer D. Venters, M.D., is the Chief Medical Officer and Assistant Vice President of Correctional Health Services for New York City Health and Hospitals Corporation. He also is a faculty member at the New York University Center for Survivors of Torture and co-chairs a federal

health advisory group on medical care for detainees. Dr. Venters has written and testified before Congress on the health risks of incarceration and the intersection between correctional health and human rights.

19. Brie Williams, M.D., is an Associate Professor of Medicine in the Division of Geriatrics at the University of California, San Francisco. She also is the Founding Director of the University of California Criminal Justice & Health Consortium, and the Director of the Criminal Justice and Health Project at the University of California, San Francisco. Dr. Williams has published work calling for a broader inclusion of prisoners in national health datasets and in health research funded by the National Institutes of Health, and for more scientific development of compassionate release policies.

RECORD AND BRIEFS



In The
# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents,*

JOHN D. ASHCROFT AND ROBERT MUELLER,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents,*

DENNIS HASTY AND JAMES SHERMAN,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of a group of law professors who teach and write in the areas of Civil Procedure and Federal Courts. *See* Appendix (listing *amici*). Although we conclude that respondents have adequately pled a claim upon which relief can be granted, our principal focus is not on the merits of this case, but on the procedural standards used to assess the legal sufficiency of a pleading. Our goal is to promote a coherent and workable system of pleadings that is consistent with the Federal Rules of Civil Procedure and with this Court's precedents interpreting those rules.[1]

## SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 8(a)(2), as interpreted by this Court, a plaintiff is required to plead facts that plausibly suggest a claim upon which relief can be granted. The plausibility standard does not require particularity; nor does it require facts sufficient to state a cause of action. Rather plausibility requires non-conclusory factual allegations that *suggest*

[1] Petitioners and respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. Loyola Law School, Los Angeles, California, paid the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation and submission of this brief.

liability, i.e., factual allegations that are not merely consistent with liability but that are positively charged toward a finding of liability. The Petitioners, including the United States, argue that plausibility pleading requires a district court to weigh potential inferences drawn from the non-conclusory facts and to credit only the one inference the court deems to be the more likely. This proposed standard would require lower federal courts to engage in a type of pre-discovery fact finding that is akin to summary judgment and unwarranted by the rules and this Court's precedents. Indeed, the standard endorsed by the Petitioners would create a pleading system stricter than that followed in code-pleading jurisdictions.

## ARGUMENT

Introduction. In each of these three consolidated cases, this Court granted certiorari on three questions, the first pertaining to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the second to qualified immunity, and the third to pleading. This brief addresses the pleading question, which essentially asks whether specified claims in the Respondents' Fourth Amended Complaint satisfy the "short and plain statement" requirement of Federal Rule of Civil Procedure 8(a)(2). The resolution of that question depends on the scope of Rule 8(a)(2)'s pleading standard and on the application of that standard to the specific claims now at issue. In our view, the

Court of Appeals applied the correct pleading standard correctly.

This case has been stuck in the groove of pre-trial motions from its inception. Thirteen years. One can safely surmise that had the matter gone to discovery, it would have long ago settled or have been resolved on the merits one way or another. Focusing now on the pleading question alone, it must be kept in mind that pleadings are the essential first step in the processing of a plaintiff's claim. They are the gateway to the federal judicial system. Anyone who has studied the matter knows that law of pleadings under the Federal Rules of Civil Procedure was meant to impose minimal requirements of notice and factual particularization. The idea was to avoid battles over the pleadings and to process claims through the rules. Discovery was understood to be a valuable process to determine the actual facts necessary to assess the plaintiff's claim. The rules were meant to promote that possibility. Of course, the complexity of federal law and civil litigation has grown since the adoption of the original federal rules and some adjustment of those rules can be expected as a product of that evolution. But any such adjustment should be sensitive to the underlying principle that pleadings are meant to initiate a lawsuit, not resolve it. We must also keep in mind that without access to a fair and efficient system of procedure to enforce rights, there is no justice. Indeed, there are no rights.

1. The Scope of the Rule 8(a)(2) Pleading Standard. As is well established, Rule 8(a)(2) endorses a simplified, pragmatic pleading standard, one that is to

be contrasted with the more formalistic approach used in code-pleading systems. *See Advisory Committee Report of October, 1955 on Rule 8(a)(2).* In the words of Judge Charles E. Clark, a key force in the drafting and adoption the original Federal Rules, "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Dioguardi v. Durning*, 139 F.2d 774, 775 (2nd Cir. 1944).

The distinction drawn by Clark tells us what the short-and-plain-statement standard *isn't* – it isn't code pleading. It is a little more difficult, however, to say what that standard *is* without straying into verbal abstractions. The sample complaints in the Appendix of Forms, which accompanied the original federal rules, were designed to overcome that difficulty by providing "pictures" of complaints deemed satisfactory under the Federal Rules.[2] Thus, despite their recent abrogation, the forms give us an idea of what the drafters of the federal rules had in mind when they adopted the short-and-plain-statement standard. Consistently with those illustrations, Rule 8(a)(2)'s pleading standard should be satisfied if the complaint provides a factual context that particularizes the claim from other matters and gives the defendant fair notice of the grounds

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[2] *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) (describing the forms as "pictures" that portrayed the meaning of Rule 8(a)(2)).

on which the plaintiff seeks relief.[3] This, of course, is quite different from the more formal code-pleading requirement that the plaintiff provide a statement of facts constituting a specified cause of action.

This Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), clearly endorsed a more fact-intensive approach to pleading than the one envisioned by the drafters of Rule 8(a)(2). Neither opinion, however, purported to extinguish the fundamental distinction between simplified pleading and code pleading. *See Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 677-678; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly* as establishing a "fair notice" standard). Hence, post-*Twombly-Iqbal*, we can still say with some certainty that the short-and-plain-statement standard *isn't* code pleading. But, given *Twombly* and *Iqbal*, what is it?

The key case is *Iqbal*. The question there was whether the plaintiff's complaint adequately alleged claims of intentional discrimination against two high government officials. *Id.*, at 669. The *Iqbal* Court proposed a specific framework through which to measure the adequacy of a complaint: identify the substantive elements of an identified right of action, *id.*, at 675-677; accept as true all non-conclusory factual allegations in the complaint and all reasonable inferences drawn therefrom, *id.*, at 678-679; and determine whether the

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[3] *See, e.g.*, FED. R. CIV. PROC. Form 9 (negligence) (1938); *see* Clark, *Pleading Under the Federal Rules*, supra, note 1, at 183.

non-conclusory factual allegations "plausibly suggest" a claim for relief, *id.*, at 681.[4]

As to the final step, the *Iqbal* Court instructed:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

*Id.*, at 678 (internal citations omitted). The quotation is a bit opaque. Clearly, however, "plausibility" is the key, and the Court locates plausibility somewhere between "probability" and "sheer possibility." The former is *not required* since probability requires a weighing of

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[4] The *Iqbal* Court's mechanical distinction between conclusory and non-conclusory allegations, under which only the latter are credited in the assessment of a pleading's adequacy, is troubling to the extent that it erects a substantial barrier to the resolution claims that require the plaintiff to establish the defendant's state of mind. Typically, such state-of-mind information is of a type over which there is an asymmetry of access that strongly favors the defendant. There is no argument in these cases, however, that the Court of Appeals relied on conclusory allegations.

facts, which would be inappropriate at the pre-discovery pleading stage of a case. A sheer possibility, on the other hand, is *not sufficient* since it is premised solely on a coincidental consistency with liability. Such a coincidental consistency is essentially agnostic on the question of liability. In the Court's view, it generates nothing more than untethered speculation on the remote possibility that liability can be established. Plausibility, on the other hand, requires the pleading of facts that are positively *suggestive* of liability. They are not neutral on the question of liability, but affirmatively support such a finding. Such facts move the possibility of liability from the realm of speculation into the realm of reasonable inquiry.

In *Iqbal*, the Court identified the plaintiff's rights of action as premised on various forms of invidious discrimination, all of which required a showing of discriminatory purpose. *Id.*, at 669, 676. After identifying that common element, the Court focused on the nonconclusory factual allegations in the complaint to see whether any of them were suggestive of purposeful discrimination. The Court concluded that there were *no such allegations*. "[T]he complaint does not show, *or even intimate*, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*, at 683 (emphasis added). Hence, while the

plaintiff's factual allegations were certainly consistent (or merely consistent) with the possibility of a discriminatory purpose, that consistency was coincidental and offered no basis from which to move the complaint beyond speculation.

The plausibility standard does nudge federal pleading practice away from classic simplified pleading by discounting conclusory allegations and by insisting that the complaint include non-conclusory factual allegations supportive of each element of the right of action at issue. We might dispute that move, but it has been made and it is part of our jurisprudence. It should not, however, be read as an evisceration of Rule 8(a)(2) or as an endorsement of code pleading. Certainly the Court did not purport to do either, and the Court's insistent use of the phrase, "plausibly suggests," is far less demanding than the more rigid "facts constituting a cause of action." We should assume that the Court's use of the word "suggests" (and all its variations) was purposive and designed to conform to the general concept of simplified pleading as being less demanding than code pleading.

Consistently with the foregoing, the critical difference between simplified pleading (as modified by *Iqbal*) and code pleading is that the latter is both more formal and more fact-intensive. In essence, code pleading requires allegations of fact that align with each element of a cause of action and that, if proved at trial, would entitle the plaintiff to relief. Simplified pleading, on the other hand, requires allegations of fact that move the question of potential liability from the realm

of pure speculation (mere consistency with liability) and into what we might call the realm of reasonable inquiry (plausibly suggestive of liability). This small but important distinction treats federal pleading as distinct from code pleading and as part of an entire system of procedure, rather than as a stand-alone provision that operates as a formal preclearance requirement. Most importantly, it gives district court judges the ability to exercise judgment in determining whether and to what extent a complaint is sufficient to proceed to the discovery phase of litigation, that is, so long as the complaint is something more than an exercise in pure conjecture. In the *Iqbal* Court's words:

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief."

*Id.*, at 679 (citation omitted). Thus, under *Iqbal*, district courts are tasked with the context-specific obligation of determining whether the "plausibly suggests" standard has been satisfied. There is, however, a minimal requirement of some facts suggestive of liability, i.e., of some facts that can be rationally understood as moving the claim from a coincidence between the facts and liability to one in which the facts positively suggest, but do not necessarily establish, liability.

The Court of Appeals appears to have understood the above-described standard:

> To satisfy *Iqbal*'s plausibility standard, Plaintiffs must "plead . . . factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Although plausibility is not a "probability requirement," Plaintiffs must allege facts that permit "more than a sheer possibility that a defendant has acted unlawfully." Factual allegations that are "merely consistent with" unlawful conduct do not create a reasonable inference of liability.
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> Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Well-pleaded factual allegations, in contrast, should be presumed true, and we must determine "whether they plausibly give rise to an entitlement to relief." Ultimately, every plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

*Turkmen v. Hasty*, 789 F.3d 218, 233 (2d Cir.), *rehearing denied*, 808 F.3d 197 (2015) (internal citations omitted). The only question, therefore, is whether that court correctly applied this "context-specific" standard.

The Government invites a more aggressive approach to the assessment of pleadings. Petitioner's Brief, No. 1359, at 42-43. It suggests that *Iqbal* requires lower federal courts to discount a plaintiff's

allegations whenever there are "more likely explanations" for the challenged conduct. Rather than presuming the truth of those allegations, the Government would prefer that a court credit the "obvious alternative explanation." It arrives at this position by positing that the conclusory allegations in *Iqbal* were deemed "implausible" because the Court thought that there were "more likely explanations" for the challenged policy. But the Court's reference to a "more likely explanation" occurred only after it had concluded that the non-conclusory allegations in the *Iqbal* complaint did not even "intimate" a discriminatory purpose. *Iqbal*, 556 U.S. at 683. The Government's free-floating invitation to permit lower federal courts to search for the "more likely" or the more "obvious alternative" invites a type of pre-discovery fact determination that would operate more like a summary judgment than it would an assessment of the pleadings. Essentially, the Government wants a standard that forces the weighing of competing inferences, under which only the most likely survives. Nothing in *Iqbal* endorses such an aggressive approach to pleadings. Indeed, what the Government suggests would take simplified pleading well beyond the requirements of code pleading. *See also* Petitioner's Brief, No. 1363, at 46-57 (relying heavily on an obvious-and-more-likely theory of pleading); Petitioner's Brief, No. 1358, at 23, 27-28 (incorporating the Government's argument).

In short, we believe that it is inarguable that the Court of Appeals described and applied the correct pleading standard, one that preserves simplified

pleading as a method distinct from its more formal code-pleading counterpart.

2. Application of the Standard. We expect that the Respondents will provide a detailed defense of the Court of Appeals fact-specific application of the Rule 8(a)(2) standard. We will, therefore, limit our discussion here to two points of law that we find particularly troubling in the Government's brief and to a point of principle that we deem of overarching significance.

In its brief, the Government uses the word "conclusory" as a catch-all pejorative designed to discount the legitimacy of inferences drawn from the plaintiffs' factual allegations by the Court of Appeals. Petitioner's Brief, No. 1359, at 45, 48. That is an improper use of a term of art. For purposes of pleading, we understand a conclusory allegation to be one that merely replicates a legal standard without factual elaboration, as in "the defendant acted with invidious intent." Certainly that is how the phrase was used in both *Twombly* and *Iqbal*. The Government's Brief points to no such conclusory allegation. The habitual use of the word "conclusory" to cover all factual allegations or inferences with which one disagrees is both unhelpful and misdirected. Every factual allegation and every inference drawn therefrom represents a conclusion, but not every factual allegation or inference is conclusory. Any validation of the Government's use of the term will add a confusing complexity to federal pleading practice and to the judicial assessment of the adequacy of a pleading.

Similarly, the Government demands that the inferences drawn by Court of Appeals be the ones the Government would credit as "likely," echoing its earlier invocation of a most-likely-explanation standard. But there is no such requirement. Rather, as the *Iqbal* Court recognized, "the reviewing court [must] draw on its judicial experience and common sense" in determining whether the allegations *plausibly suggest* an inference of liability. *Iqbal*, 556 U.S., at 679. And, as the Court in *Twombly* observed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and *unlikely*." *Twombly*, 550 U.S., at 556 (internal quotations omitted) (emphasis supplied). We fear that the Government's zealous advocacy may have led it to endorse a dangerously aggressive form of pleading analysis, one that runs directly against this Court's admonition in both *Twombly* and *Iqbal* that it was not imposing a probability requirement. *Twombly*, 550 U.S., at 556; *Iqbal*, 556 U.S., at 678.

Finally, this case involves the drawing of inferences from non-conclusory allegations said to be plausibly suggestive of liability. We doubt that this Court can devise a verbal formula that is superior to its recognition that plausibility is context-specific and that its determination is best left to the judicial experience and common sense of lower federal courts. Certainly, the Petitioners have offered no doctrinal method through which to determine the reasonableness of the challenged inferences other than through

their misuse of the "conclusory" *ipse dixit*. We think the Court should leave its deferential standard intact.

3. The Relationship Among the Issues Presented on Certiorari. The pleadings issue presented in this case cannot be wholly separated from the *Bivens* and qualified immunity issues raised by the Petitioners. These seemingly separate doctrinal categories do not operate in a vacuum. They operate dynamically within the system of the Federal Rules. That system was premised on a specific idea of "the claim" as being an operative set of facts giving rise to one or more rights of action.[5] The function of the federal rules was to process such claims through a careful examination that would require a full development of the facts. Only in this manner can we know the rights that arise out of those facts. To this extent the operation of the rules of pleading and discovery were inextricably intertwined and essential to the fair assessment of the claim. They provided method through which the claim could be known.

The Petitioners argue that "special factors" counsel against the recognition of a *Bivens* action in the context of high-level policy decisions that implicate national security and immigration. Petitioner's Brief, No. 15-1359, at 18-30. Essentially, they ask this Court to treat claims arising in such circumstances as political questions not susceptible of judicial review. This is a

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[5] See Simona Grossi, *A Principled Approach to Procedural Reform: Zooming in the Claim*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2851185.

bold move and particularly so at the pleading stage when the facts are not fully developed and the scope rights arising out of those facts remain obscure.

This Court cannot know whether "special factors" counsel against recognition of a *Bivens* action unless it knows the full story of the "new context" from which those special factors are said to arise. Indeed, that story might reveal a pressing need to provide a remedy for systemic, policy-driven initiatives that willfully ignore established constitutional rights.

The same can be said for a premature validation of a qualified immunity defense. Whether the defendants acted in objective good faith can only be determined if a court knows the how and why of the defendants' actions. We recognize the value of making the qualified immunity determination as early as possible in the litigation process, but that value does not outweigh the value of deciding cases based on the actual facts. A presumed set of facts is no substitute for reality. To resolve either of these questions on an incomplete or presumed version of the facts, would be reminiscent of this Court's unfortunate decision in *Korematsu v. United States*, 323 U.S. 214 (1944), where the true facts did not emerge until decades later.

## CONCLUSION

We believe the wisest course of action is to dismiss these writs as improvidently granted and to allow the district court to oversee discovery under Federal Rule

of Civil Procedure 26(b)(1), including the recently adopted proportionality standard.

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Respectfully submitted,

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